Jurisdictional Statement

81-896

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION,
Appellant,

v.

PERRY LOCAL EDUCATORS ASSOCIATION,
EVELYN E. WADDELL and JUDITH M. DIETRICH,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the First Amendment (as incorporated into the Fourteenth Amendment) to the United States Constitution violated when a union that has been designated as the exclusive collective bargaining representative for public school teachers is granted access to certain non-public communication facilities in order to perform its representational functions, while such access is denied to a rival union that is not the exclusive collective bargaining representative?

2. Is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution violated when a union that has been designated as the exclusive collective bargaining representative for public school teachers is granted access to certain non-public communication facilities in order to perform its representational functions, while such access is denied to a rival union that is not the exclusive collective bargaining representative?

LIST OF PARTIES

In addition to the parties listed in the caption, the following were co-defendants with appellant in the district court, and co-appellees with appellant in the court of appeals:

William Hohlt, Robert Bush, Thomas Cochran, James Stainbrook, Jr., and Richard A. Poppa, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana.

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JURISDICTIONAL STATEMENT

Perry Education Association respectfully appeals from the judgment of the United States Court of Appeals for the Seventh Circuit in *Perry Local Educators Association, et al v. William Hohlt, et al.*, 652 F.2d 1286 (7th Cir. 1981).

OPINIONS BELOW

The district court's opinion and judgment are unreported, and reprinted at App. 35a-41a and App. 42a, respectively. The court of appeals' opinion is reported at 652 F.2d 1286, and is reprinted at App. 1a-33a.

JURISDICTION

This is an appeal from a decision of the Court of Appeals for the Seventh Circuit which held invalid as repugnant to the United States Constitution two pro-

visions in a collective bargaining agreement between a public school district and the union representing its teachers. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).[1]

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[1] The provisions of a collective bargaining agreement entered into between a public school district and the union representing its teachers would not in ordinary parlance be thought to be a "state statute." But the principles enunciated by this Court in defining the reach of its appellate jurisdiction indicate that the provisions in question do come within the ambit of 28 U.S.C. § 1254(2).

"For the purposes of § 1254(2), local ordinances are treated as state statutes." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2. A "legislative" enactment of a public school district, adopted pursuant to authority vested in the school district by state statute, constitutes a "state statute" for purposes of appellate jurisdiction, *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203, 206, and the collective bargaining agreement provisions involved in this case are such an enactment. They have "continuing force and [are] intended to be observed and applied in the future," *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 104, see also *Lathrop v. Donohue*, 367 U.S. 820, 827; are specifically enforceable by judicial action, Ind. Code Ann. § 20-7.5-1-7(c) (Burns, 1975) (reprinted *infra* at App. 51a); and were adopted pursuant to authority expressly invested in the school district by state statute, Ind. Code Ann. § 20-7.5-1-3 (Burns, 1975) (App. 48a).

It is clear that these contractual provisions would constitute a legislative enactment (and a "state statute" within the meaning of § 1254(2)) if they had been promulgated unilaterally by the school district as regulations. The fact that they were adopted instead as part of a collective bargaining agreement should not alter their status for purposes of § 1254(2). For:

> The collective bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all the attributes of legislation for the subjects with which it deals. Where a teachers' union, for example, acting pursuant to a State statute authorizing collective bargaining in the public sector, obtains the agreement of the school board that teachers residing outside the school district will not be hired, the provision in the bargaining agreement to that effect has the same force as if the school board had adopted it by promulgating a regulation.

[Footnote continued on page 3]

The court of appeals issued its opinion on June 24, 1981. A timely petition for rehearing was denied on August 14, 1981 (App. 34a). This jurisdictional statement is filed within ninety days of the latter date, and a timely notice of appeal has been filed in the court of appeals (App. 43a).

PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are involved on this appeal:

> Amendment I. Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
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> * * * *

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[1] [Continued]

Abood v. Detroit Bd. of Ed., 431 U.S. 209, 253 (Powell, J., concurring in judgment). See also *id.* at 228-229 (Opinion of the Court).

Abood was an appeal pursuant to 28 U.S.C. § 1257(2), in which this Court reviewed a state court decision that "consider[ed] the constitutionality of the agency shop clause [in a collective bargaining agreement between a public school district and a teachers' union], and upheld its facial validity." *Id.* at 215-216. A state statute specifically authorized the negotiation of the agency shop in *Abood*. Portions of this Court's opinion in *Abood* literally purport to be assessing the constitutionality of that statute, see *id.* at 211, 224-225. Other portions suggest that it was not the *permissive* state statute, but rather the *mandatory* provision in the collective bargaining agreement that constituted the "state action" that was being subjected to constitutional scrutiny. See *id.* at 215, 216-217 n.9, 217, 226. This case is parallel to *Abood* in any event, for here as there a collective bargaining agreement negotiated by a school board pursuant to authority conferred by a state statute is the subject of the constitutional attack.

While it is our belief that this appeal is appropriate under 28 U.S.C. § 1254(2), we recognize that this Court may disagree. In such event, these papers will be "regarded and acted on as a petition for writ of certiorari," 28 U.S.C. § 2103, and for the reasons stated herein a writ should issue.

> Amendment XIV, Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Public Law 217 of the 1973 Indiana General Assembly, Title 20, Art. 7.5 of the Indiana Code Annotated—the statute regulating labor relations between public school corporations in Indiana and their certificated employees—are reprinted *infra* at App. 45a-54a, and the relevant provisions of the rules and regulations implementing that Law are reprinted at 55a-56a.

The provisions of the collective bargaining agreement between petitioner and the Metropolitan School District of Perry Township, Indiana, involved on this appeal are as follows:

> Article II
>
> Association Rights and Responsibilities
>
> * * * *
>
> Section 2—Communications
>
> * * * *
>
> C. The [Perry Education] Association is permitted access, to teachers' mailboxes in which to insert material, provided the Association makes a copy available to the building principal in advance of the distribution. The Association's sponsorship shall appear on all materials which are distributed through teachers' mailboxes. The rights and privileges of the Association, acting as the representative of the teachers, as set forth in Article II, Section 2 part C of this agreement shall not be granted to any other school employee organization as defined in IC 1971, 20-7.5 more commonly known as PL 217.
>
> D. The Association shall be permitted to use the inter-school mail system provided that the school corporation shall have no obligation to make special arrangements, incur extra expenses, or devote time beyond that required for inter-school mailing normally and routinely instituted by the school corporation. The rights and privileges of

the Association, acting as the representative of the teachers, as set forth in Article II, Section 2 part D of this Agreement, shall not be granted to any other school employee organization as defined in IC 1971, 20-7.5 more commonly known as PL 217.

STATEMENT OF THE CASE

Public law 217 of the 1973 Indiana General Assembly, Title 20, Art. 7.5 of the Indiana Code Annotated (hereinafter "Indiana Statute") authorizes public school teachers to select a union to represent them in collective bargaining with their employing school district. The union selected by a majority of the teachers in an appropriate collective bargaining unit is designated as the "exclusive representative" for all of the teachers in that unit. Ind. Code Ann., Section 20-7.5-1.2(1) (App. 46a).

The Indiana Statute establishes a procedure for selecting an exclusive representative from among competing unions. While a representation contest is in progress, the school district cannot favor one union over another in regard to the right to communicate with teachers: it must accord them equal access to non-public communication facilities. Once the representation dispute is resolved, however, the Indiana Statute permits the school district to provide access to such facilities to the union selected "for the discharge of the exclusive representative's duties of representing the bargaining unit and its individual members" without having to provide equal access to rival unions. See App. 9a-10a and n. 13. See also *Pike Independent Professional Educators*, No. U-76-16-5350 (May 20, 1977), reprinted *infra* at App. 57a-64a. This preferential access may continue only while the status of the exclusive representative is insulated from challenge (under the Indiana Statute, the insulation period is in most instances two years). Section 20-7.5-1.10(c)(4) (App. 54a; see also App. 55a-56a).

In 1977, the Indiana Education Employment Relations Board (hereinafter "Board"), which is the state agency responsible for administering the Indiana Statute, conducted an election to select an exclusive representative for a collective bargaining unit of teachers employed in the Metropolitan School District of Perry Township (hereinafter "School District"). The competing organizations were the appellant, Perry Education Association (hereinafter "PEA"), and the Perry Local Educators' Association (hereinafter "PLEA"), one of the appellees herein.[2] PEA won the election and was certified by the Board as the exclusive representative.

PEA and the School District entered into a collective bargaining agreement in 1978. Among other things, the agreement gave PEA "access to teachers' mailboxes in which to insert material" and the right to use "the inter-school mail system" for the delivery of material between school buildings (hereinafter collectively "school mail facilities"). After expressly indicating that the foregoing "rights and privileges" were being accorded to PEA "acting as the representative of the teachers . . .," the agreement stated that these rights and privileges "shall not be granted to any other school employee organization. . . ." (The relevant provisions of the collective bargaining agreement are quoted in full at pp. 4-5, *supra*).

Teachers have in the past used the school mail facilities to send personal messages to one another, and individual school building principals have on occasion allowed local church groups and civic and charitable organizations to use the facilities to communicate with teachers. The school mail facilities are not, however, generally available for use by the public.

The District Court's Decision

This lawsuit was filed in the United States District Court, Southern District of Indiana, Indianapolis Di-

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[2] The other appellees are two individual members of PLEA.

vision, in 1979 by PLEA and two of its members. Plaintiffs challenged the above-described provisions of the collective bargaining agreement between PEA and the School District, contending that PEA's preferential access to the school mail facilities violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Named as defendants were the members of the School District's Board of Education (in their individual and official capacities) and PEA. All parties moved for summary judgment, and the district court granted defendants' motions.

With respect to the First Amendment claim, the district court noted that the "normal and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to teachers." (App. 38a). Concluding that these facilities were, therefore, not public forums (*id.*), it quoted *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471, 481 (2d Cir. 1976), for the proposition that the School District has "no constitutional obligation *per se* to let any organization use the school mail boxes . . . to communicate its views to the teachers . . . whether or not the subject matter of the communication is school related." (App. 39a).

The district court then turned to the Equal Protection claim. Noting "the very different status of . . . PEA as the recognized collective bargaining representative for *all* Perry Township teachers, and PLEA, as a rival teacher group . . ." (App. 40a; emphasis in original), the court concluded that the differential treatment bore "a rational relationship to the goal of labor peace within the schools and school system," and thus did not violate the Equal Protection Clause.

The Court of Appeals' Decision

The court of appeals reversed, holding that once the School District "opens its internal mail system to PEA but denies it to PLEA, it violates both the equal protec-

tion clause and the first amendment as incorporated into the fourteenth." (App. 7a).

Although acknowledging that PEA "has legal duties to the teachers that PLEA does not have . . ." (App. 29a), the court of appeals found this difference irrelevant to the issue before it. That issue, according to the court, was not whether the School District had a "legitimate interest in allowing PEA to use the mail system . . .", which it concededly did, but whether it had an "interest in making PEA's use *exclusive*" (App. 29a; emphasis in original). The court of appeals elaborated as follows:

> Without an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone. The defendants do not contend that equal access for others would impose significant additional expenses on the school district, nor that it would interfere with PEA's execution of its duties as bargaining representative in any way. [App. 29a].

The court of appeals emphasized that it was not holding "that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses" (App. 31a). The court concluded, however, that the communications PEA was authorized to transmit under the contractual provisions in question did not qualify as "official business," because the School District did not "endorse" the content of those communications. (App. 15a, n. 29).[3]

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[3] In the course of its analysis rejecting the district court's holding that the distinction was justified because PEA has legal duties to the teachers as the exclusive representative that PLEA does not have, the court of appeals made the following comment:

> The access policy presently in force is both overinclusive and underinclusive with respect to that asserted justification: over-

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial, and they warrant the attention of this Court for the following reasons: (1) the position taken by the court

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> inclusive, because the collective bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties, and hence does not exclude messages simply critical of PLEA; underinclusive, because the school district permits outside organizations with no special duties to the teachers to use the system. [App. 29a].

Although the foregoing quotation might at first glance appear to narrow the issues in this case (*i.e.*, to the constitutionality of a contractual provision that accords preferential access rights to the exclusive representative *not* confined to representational functions and/or to a non-public forum), other portions of the opinion make clear that the case presents the issues in the broadest context.

To begin with, the assertion by the court of appeals that PEA's use of the school mail facilities is not limited to communications relevant to its legal duties as exclusive representative (see also App. 10a, n.13) is without record support. By the terms of the collective bargaining agreement, the school district accorded access to PEA "acting as the representative of the teachers. . . ." And there is nothing in the record to suggest that PEA *in fact* used the school mail facilities other than for the indicated purpose. This factual misstatement was immaterial to the court's decision, however, for the court was explicit that even if PEA's communications were limited to its representational functions "that would not change the result." (App. 10a, n.13).

The court of appeals' other observation—that "the school district permits outside organizations with no special duties to the teachers to use the system"—admittedly played no part in its decision. Thus, the court concluded that the school mail facilities were a non-public forum, and emphasized that its holding

> . . . is premised entirely on the discrimination between members of PEA and other teachers; at no point did we rely solely on the fact that the school district permits outside organizations to use the mail system. (App. 31a).

The court of appeals succinctly summarized its position regarding the above two points when, in the same paragraph quoted at the outset of this footnote, it stated:

[Footnote continued on page 10]

of appeals is in direct conflict with the position taken in a virtually unbroken line of federal and state court decisions; (2) since public employers regularly accord to exclusive representatives preferential access rights of the type involved here, the court of appeals' opinion undermines a basic element of public sector labor relations; and (3) the court of appeals' analysis and application of the controlling constitutional principles is at odds with decisions of this Court.

1. Conflict With Other Lower Court Decisions

The court of appeals acknowledged that its position is in direct conflict with nine "cases fairly on point, including two decided by federal Courts of Appeals, [four] decided only at the district court level, and three decided by state appellate courts." App. 6a. Specifically, a contrary position has been taken by the Second and Sixth Circuit Courts of Appeals,[4] district courts in the Second, Eighth and Tenth Circuits,[5] and state appellate courts

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[3] [Continued]

> More fundamentally, we hold that such an exclusive access policy would be invalid even aside from questions of fit. . . . (App. 29a).

As the case was remanded to the district court "for proceedings in conformity with this opinion" (App. 33a), the latter passage requires the district court to invalidate the provisions *en toto*. Had the decision been limited only to "questions of fit," the proper instruction to the district court on remand would have been to enter an injunction that permitted the school board to continue denying access to the mail system to all other unions so long as it confined PEA's use to communications related to its representational functions. See, e.g., *Parker v. Levy*, 417 U.S. 733, 760; *Broadrick v. Oklahoma*, 413 U.S. 601, 613.

[4] *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2nd Cir. 1976); *Memphis American Federation of Teachers Local 2032 v. Board of Education*, 534 F.2d 699 (6th Cir. 1976).

[5] *Federation of Delaware Teachers v. De La Warr Board of Education*, 335 F.Supp. 385 (D. Del. 1971); *Teachers Local 3724 v.*

in New York, Florida and Nevada.[6] Against this body of conflicting precedent, the court of appeals admitted that "[t]he only case we have found holding unconstitutional a school district's refusal to grant a minority union access to teachers' mailboxes or other facilities while granting such privileges to a major union . . .", App. at 6a, n. 7, is a district court decision in its own circuit.[7]

2. Practical Impact

The system of exclusive representation has been a cornerstone of American labor relations policy in the private sector since the enactment of the Wagner Act in 1935, and in recent years has gained widespread acceptance in the public sector. Exclusive recognition is provided for in the statute governing labor relations in the federal sector,[8] as well as in statutes of a majority of the states regulating labor relations among state and local government employees.[9]

North St. Francis County School District, 103 LRRM 2865 (E.D. Mo. 1979); *Local 858, American Federation of Teachers v. School District No. 1*, 314 F.Supp. 1069 (D. Colo. 1970).

[6] *Maryvale Educators Association v. Newman*, 70 A.D.2d 758, 416 N.Y.S.2d 876, appeal denied, 48 N.Y.2d 605, 424 N.Y.S.2d 1025 (1979); *Geiger v. Duval County School Board*, 357 So. 2d 442 (Fla. App. 1978); *Clark County Classroom Teachers Association v. Clark County School District*, 91 Nev. 143, 532 P.2d 1032 (1975) (alternative holding).

[7] *Teachers Local 399 v. Michigan City Area Schools*, No. 72-S-94 (N.D. Ind. Jan. 24, 1973), *vacated on other grounds*, 499 F.2d 115 (7th Cir. 1974).

[8] Civil Service Reform Act of 1978, 5 U.S.C. § 7111. Prior to 1978, exclusive representation was authorized in Executive Order 11491.

[9] These statutes are cited *infra*, App. 65a-69a. In addition, although the New York public sector collective bargaining statute, N.Y. Civil Service Law §§ 200 to 214, does not expressly provide for exclusive representation (it is silent on the point), all of the recognitions that have been granted to teacher unions in that state have been exclusive.

In the private sector, the nearly universal practice is for the employer to grant to the exclusive representative (but not to rival unions) access to certain non-public forums for communicating with members of the collective bargaining unit, and this practice likewise is mirrored in the public sector.[10] Indeed, while the National Labor Relations Act *permits* private employers to distinguish between the exclusive representative and rival unions in furnishing such access,[11] the rules in the federal sector and in some of the states have been construed to *require* the employer to make that distinction (i.e., it is an unfair

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[10] The general rule is to accord preferential access rights to the exclusive representative only during the period that it is insulated from challenge, and not during representation contests. See, e.g., *Federal Aviation Administration, Eastern Region, Boston ARTCC*, A/SLMR No. 273 (U.S. Dept. of Labor, 1973); *School Board of Palm Beach County*, 5 FPER 10151 (Fla. PERC, 1979); *County of Erie*, 2 NPER 33-13105 (N.Y. PERB, 1980).

[11] See, *e.g.*, *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968); *International Ass'n. of Mach. & A. Wkrs. Dist. No. 9 v. NLRB*, 415 F.2d 113, 115 (8th Cir. 1969); *General Motors Corp.*, 240 NLRB 168 n.1, 169-171 (1979) (and see cases cited therein).

In suggesting otherwise, the court of appeals has misread this Court's opinion in *NLRB v. Magnavox*, 415 U.S. 322 (App. 7a-9a). Section 7 of the NLRA, 29 U.S.C. § 157, gives each employee a protected right to distribute literature in non-working areas of a plant during non-working time. *Magnavox* held that this right is personal to the employee, and cannot be waived by the exclusive representative. But employees do not have a § 7 right of access to bulletin boards or other communicative media, and *Magnavox* did not purport to require equality of access in that regard. Indeed, the exclusive representative in *Magnavox* had negotiated a provision that this Court did not disturb, according it sole access to bulletin boards. 415 U.S. at 323, 326.

In the instant case, appellees were free to distribute literature in non-working areas of the schools during non-working time (App. 28a). In short, the court of appeals is wrong when it states that PEA's preferential access to the school mail facilities would be unlawful if provided by a private employer under the NLRA.

labor practice in those jurisdictions for the public employer to grant such access to unions other than the exclusive representative).[12] Under the court of appeals' opinion, these statutes would be unconstitutional.

In those states in which the statutes authorize, but do not require, a public employer to accord preferential access rights to the exclusive representative,[13] contractual provisions of the type here are the norm. According to the National Education Association (appellant's parent organization) preferential access provisions similar to those at issue here are widespread in school district/teacher union collective bargaining agreements; and all would be rendered unconstitutional by the court of appeals decision.

Although there is nothing in the opinion of the court of appeals that, in and of itself, prohibits public employers from granting the exclusive representative access to nonpublic forums in order to communicate with members of the collective bargaining unit (i.e., so long as the same access is provided to rival unions), public employers may be less willing to do so if the "price" is an obliga-

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[12] See, *e.g.*, *Department of the Army, U.S. Army Natick Laboratories, Commissary Store Complex, Oakland*, A/SLMR No. 654 (U.S. Dept. of Labor, 1976); *Commissary, Fort Meade, Department of the Army*, A/SLMR No. 793 (U.S. Dept. of Labor, 1977); *Department of the Air Force, Grissom Air Force Base*, A/SLMR No. 852 (U.S. Dept. of Labor, 1977); *Department of Transportation, Federal Aviation Administration*, 1 FLRA No. 48 (1979). The federal decisions were construing Section 19(a)(3) of Executive Order 11491, replaced in 1978 by enactment of the Civil Service Reform Act. A virtually identical provision appears in that Act, 5 U.S.C. § 7116(a)(3), and although there have been no decisions construing this provision of the Act the federal agencies have acted on the assumption that it will receive the same construction.

[13] See, e.g., *Broward County School Board*, 6 FPER § 11088 (Fla. PERC, 1980); *Union County Board of Education*, 2 NJPER 50 (N.J. PERC, 1976); and cases cited in notes 5, 6 and 7 *supra*.

tion to open these forums to other organizations as well.[14] In effect, then, the position taken by the court of appeals has the potential to close such non-public forums "to all but official business. . ." (App. 31a), and this seriously would impair the ability of the exclusive representative to perform its "legal duties to the teachers. . . ." (App. at 29a).

3. Constitutional Principles

The decision below declares unconstitutional, for the public sector, labor relations policies that have been approved as part of the national labor policy in the private sector.[15] And it does so by announcing two constitutional principles, one of which goes far beyond anything decided by this Court, and the other of which is in direct conflict with decisions of this Court.

a. In holding that denial of access to a non-public forum violates the First Amendment *per se* (as distinquished from the Equal Protection Clause) the decision below goes far beyond the decisions of this Court. This Court has never held that *any* private person or organization has a right of access protected by the First Amendment to governmental facilities that are not either by their nature "public" [16] or opened to the general pub-

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[14] It should be noted in this connection that once a school district provides access to all unions (including those lacking the exclusive representative's special justification), it will have strengthened the claim of other non-labor organizations that they, too, must be provided such access. See *Police Department of Chicago v. Mosley*, 408 U.S. 92 and *Carey v. Brown*, 447 U.S. 456, holding that in the absence of special justification a labor/non-labor distinction is impermissible.

[15] See n.11, *supra*.

[16] See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 515:

> "[S]treets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely" [quoting *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315].

lic's access.[17] Rather, this Court has examined claims of right to access to non-public governmental facilities solely under the Equal Protection Clause, to determine whether the government has complied with that Clause in making distinctions in access. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301-304 (plurality opinion); *Greer v. Spock*, 424 U.S. 828, 838; *City of Charlotte v. Firefighters*, 426 U.S. 283.

b. In holding that the denial of access here violated the Equal Protection Clause, the court below articulated a principle, and thereby achieved a result, at odds with controlling decisions of this Court. The court below did not dispute that there were legitimate reasons for providing PEA access to the mail system that were wholly inapplicable to PLEA, i.e. that "the incumbent has legal duties to the teachers with respect to bargaining and contract administration that other unions and individuals do not have, and which require it to have an efficient method of communicating with the teachers" (App. 28a; see also App. 29a).[18] But the court held that once access was provided to PEA for such reasons, the right of access for

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[17] See, e.g., *Madison Sch. Dist. v. Wisconsin Emp. Rel'n. Comm'n.*, 429 U.S. 167, 175-176 (school board meeting becomes public forum when "the board sits in public meetings to conduct public business and hear the views of citizens"). In *Madison*, while the rights at issue were those of employees who wished to disagree with their exclusive bargaining representative, the vindication of those rights turned on the Court's finding that the school board meeting was a public forum at which "any citizen could have presented the same points," *id.* at 175. The Court did not address the question, presented here, whether such employees enjoy similar access to *non-public* forums in which the exclusive bargaining representative is performing its unique functions. *Id.* at 174 n.6, 175.

[18] As this Court observed in *Abood*, *supra*, 431 U.S. at 221:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement, and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones.

others depended *not* on whether they possessed equally valid reasons for access, but rather on whether the government would suffer a significant injury were it to grant access to them. The net effect of the court's ruling is that a government could preserve the "non-public" character of governmental facilities only by denying access to all; for once access was provided to some, the government would have a heavy burden to justify denying access to others.[19] The analysis of the court below thus would leave government entities with the choice of providing no access to a given medium of communication to any private party or of providing a public forum.

The approach and holding below are in direct conflict with *Greer v. Spock*, 424 U.S. 828, 838 n. 10:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be *supportive of the military mission of Fort Dix* surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever. [Emphasis added].

See also *City of Charlotte v. Firefighters*, 426 U.S. 283, 286-287; *Lehman v. City of Shaker Heights*, 418 U.S.

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[19] The court professed to be deciding only that other *unions* would be entitled to access (App. 31a-32a), but this Court's decisions suggest that once access is provided to all unions without a special justification therefor, the government loses a viable basis for denying access to the remainder of the public. See n.14, *supra*. For example, one of the purposes that the court below thought would be served by granting PLEA access is to enable it "to influence school operations" (App. 26a-27a). A blanket permission to all unions, but not to others, to use non-public governmental facilities for that purpose surely would be suspect under *Mosley* and *Carey*.

298, 303 (plurality opinion). Cf. *Young v. American Mini Theatres*, *supra*, 427 U.S. at 71-72 (plurality opinion).

At the very least, *Greer* establishes that a school board may grant access to those whose communications are "supportive of the . . . mission" of the schools without having to demonstrate an important governmental interest for excluding others. And, as the examples cited in *Greer* reflect, communications can be "supportive of the . . . mission" even though the state does not "endorse" them (cf. App. 15a, n. 29). The interest that has impelled governments to opt for the principle of exclusive recognition in dealing with their own employees is "the desirability of labor peace." *Abood*, *supra*, 431 U.S. at 224. In public employer labor relations, as under the NLRA, an integral concomitant of exclusive recognition is that the recipient shoulder the duty of representing all employees. *Abood*, *supra*, 431 U.S. at 221. The performance of that duty serves the employer's interest in labor peace, *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 66-70, and a public employer thus has legitimate reasons to open its communicative facilities for the fulfillment of that duty without opening those facilities to others who have no such duty to perform, and indeed whose presence might defeat the goal, central to the very purpose in providing exclusive recognition, of "prevent[ing] inter-union rivalries from creating dissension within the work force." *Abood*, *supra*, 431 U.S. at 220-221.[20]

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[20] In this respect, it may be noted that two of the purposes the court below stated for providing PLEA access—to enable PLEA to criticize PEA and urge teachers to switch allegiance (App. 26a-27a)—are antithetical to this goal.

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal. In the event this Court determines that there is no jurisdiction under 28 U.S.C. § 1254(2), a writ of certiorari should issue.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1420

PERRY LOCAL EDUCATORS' ASSOCIATION, EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs-Appellants,

v.

WILLIAM HOHLT, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. IP 79-C-189—James E. Noland, *Judge*

ARGUED NOVEMBER 4, 1980—DECIDED JUNE 24, 1981

Before FAIRCHILD, *Chief Judge*, WISDOM, *Senior Circuit Judge*,* and CUMMINGS, *Circuit Judge*.

WISDOM, *Senior Circuit Judge*. This case requires us to consider the constitutionality of a collective bargaining agreement between a teachers' union and a school

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* Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

board that both permits the union to use the school district's internal mail system and compels the school district to deny that right to competing unions. The plaintiffs, an insurgent union and two of its members, contend that their exclusion from the school mail system violates their first and fourteenth amendment rights. The district court disagreed. We reverse.

I.

The facts, as they appear in the parties' pleadings and affidavits, are not in dispute. The Metropolitan School District of Perry Township in Marion County, Indiana, operates a public school system made up of thirteen separate schools. Each school building is equipped with a set of mailboxes or mail slots each labelled with the name of a teacher at the school. Inter-school delivery by school employees permits messages to be delivered rapidly to every teacher in the district. The main function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. That is not its only function, however, for the present collective bargaining representative of the teachers in that school district, the Perry Education Association (PEA), also has access to the system for its own purposes.

Until 1978 the school district evidently had no firm policy on the use of the internal mail system by teachers' unions; both PEA and a minority union, the Perry Local Educators Association (PLEA), had access at least to the mailboxes, if not to the inter-school delivery system. In 1977, however, PLEA challenged PEA's status as de facto bargaining representative of the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board. PEA prevailed in the election and was formally certified as exclusive bargaining representative. In anticipation of continuing opposition from PLEA, PEA negotiated a labor contract

designed to cement its status as bargaining representative. In that contract, the school board (1) guaranteed PEA's access to the teachers' mailboxes, (2) permitted it to use the inter-school delivery system to the extent that the school district incurred no extra expense by such use, and (3) promised to deny those rights to any other "school employee organization"—a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their employer".[1] Effective in July 1978, the con-

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[1] Ind. Code Ann. § 20-7.5-1-2(k) (Burns 1975). The exact language of the contract is:

Article II

Association Rights and Responsibilities

* * *

Section 2—Communications

* * *

C. The Association [PEA] is permitted access to teacher's mailboxes in which to insert material, provided the Association makes a copy available to the building principal in advance of the distribution. The Association's sponsorship shall appear on all materials which are distributed through teachers' mailboxes. The rights and privileges of the Association, acting as the representative of the teachers, as set forth in Article II, Section 2 part C of this agreement shall not be granted to any other school employee organization as defined in IC 1971, 20-7.5 more commonly known as PL 217.

D. The association shall be permitted to use the inter-school mail system provided that the school corporation shall have no obligation to make special arrangements, incur extra expenses, or devote time beyond that required for inter-school mailing normally and routinely instituted by the school corporation. The rights and privileges of the Association, acting as the representative of the teachers, as set forth in Article II, Section 2 part D of this Agreement, shall not be granted to any other school employee organization as defined in IC 1971, 20-7.5 more commonly known as PL 217.

tract was renewed with these same provisions upon its expiration in 1980, and it is presently in force.

PEA's privilege is subject to certain obvious limitations. Because the contractual prohibition extends only to competing unions, PEA's letters and broadsides are not the only unofficial communications permitted to flow through the internal mail system. Teachers use the system to send purely personal messages. The school district allows outside organizations to use it with the approval of any building principal. Local parochial schools, church groups, YMCA's, and Cub Scout units use the system. Furthermore, the privilege extends only to use of the mail system; it does not prevent PLEA from using other school facilities to communicate with teachers. As with PEA, members of PLEA may post notices on school bulletin boards (where available); may distribute written material in the teachers' lounge; may speak with teachers during luncheon and free periods; may, with prior approval of the building principals, make announcements on the public address system; and, apparently, may freely hold meetings on school property after school hours. Finally, we may assume for purposes of this appeal that Indiana law would prevent PEA from using the mail system during the period immediately preceding an inter-union election.[2]

PLEA and two of its members filed this action under 42 U.S.C. § 1983 (1976) against PEA and the individual members of the Perry Township School Board. They contend that their exclusion from the internal mail system violates their first amendment and equal protection rights, and they seek injunctive and declaratory relief

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[2] The Indiana Education Employment Relations Board prohibited either union from using the mail system immediately before the 1977 election, so we presume that they would do so in the event of another election. Note that Indiana law requires at least two years to elapse between elections. Ind. Code Ann. § 20-7.5-1-10(c)(4) (Burns 1975).

and damages.[3] Upon cross-motions for summary judgment, the district court gave judgment for the defendants. Quoting *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471, 481 (2d Cir. 1976), the court held that "the restrictions placed upon the use of facilities not open to the general public, designed to transmit communications of limited public interest and supplemented by numerous alternative means of communication by PLEA members are 'so inconsequential that . . . [they] cannot be considered an infringement of First Amendment rights of free speech' ". Applying rational basis scrutiny to the plaintiffs' equal protection claim, the court found, citing *Memphis American Federation of Teachers Local 2032 v. Board of Education*, 534 F.2d 699 (6th Cir. 1976), that the exclusive access policy was rationally related to the goal of preserving labor peace within the school system.

From this holding, plaintiffs appeal.

II.

The plaintiffs' constitutional contentions arise from the confluence of two developments of relatively recent vintage: the rapid growth of collective bargaining in the public sector in the last two decades, and the erosion of the notion that public employment is a "privilege" to which some constitutional guarantees may be inapplicable.[4] We therefore have not had occasion to con-

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[3] The plaintiffs also made a pendent state law claim, but they do not press it on appeal.

[4] On the former point, see generally Geed, *Unionization of Mr. Chips: A Survey Analysis of Collective Bargaining in the Public Schools*, 15 Willamette L. Rev. 367 (1979). On the latter, see *Elrod v. Burns*, 427 U.S. 347, 360-61, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

sider the merits of any similar claims before,[5] and none of the Supreme Court cases on the constitutional law of public sector labor relations is directly applicable.[6] Still, the district court had authority for rejecting the plaintiffs' claims. Our research discloses ten cases fairly on point, including two decided by federal Courts of Appeals, five decided only at the district court level, and three decided by state appellate courts. All but one, a district court opinion, rejected such claims.[7] Indeed,

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[5] *Cf. Teachers Local 399 v. Michigan City Area Schools*, 499 F.2d 115 (7th Cir. 1974), also out of Indiana, which involved similar substantive issues. While that case was on appeal, Indiana passed a comprehensive statute regulating collective bargaining by public school teachers and establishing the Indiana Education Employment Relations Board to adjudicate complaints under it. We did not reach the constitutional issues because of the requirement that the minority union exhaust its newly available state administrative remedy. As noted in the text of this opinion, the IEERB has since ruled similar exclusive-rights provisions valid under state law, and so, as the parties implicitly agree, it would be futile to require exhaustion in this case.

[6] *See, e.g.*, notes 16-26 *infra*.

[7] The only case we have found holding unconstitutional a school district's refusal to grant a minority union access to teachers' mailboxes or other facilities while granting such privileges to a majority union is *Teachers Local 399 v. Michigan City Area Schools*, No. 72-S-94 (N.D. Ind. Jan. 24, 1973), *vacated on other grounds*, 499 F.2d 115 (7th Cir. 1974). *Cf. Clifford v. Moritz*, 472 F.Supp. 1094 (S.D. Ohio 1979) (granting preliminary injunction against state agency's rule that permitted nonemployee union organizers access to state mental hospital grounds only if the union already had as members at least ten percent of hospital employees statewide); *University of Missouri at Columbia-National Education Association v. Dalton*, 456 F.Supp. 985 (W.D. Mo. 1978) (striking down rule barring all union access to university mail).

Rejecting such claims are: *Connecticut State Federation of Teachers v. Board of Education*, 538 F.2d 471 (2d Cir. 1976); *Memphis American Federation of Teachers Local 2032 v. Board of Education*, 534 F.2d 699 (6th Cir. 1976); *Teachers Local 3724 v. North St. Francis County School District*, 103 L.R.R.M. 2865 (E.D. Mo. 1979); *Haukedahl v. School District No. 108*, No. 75-C-3641

many of these cases upheld exclusive access policies considerably broader than the one followed by the Perry Township school board. For example, the two leading cases, *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2d Cir. 1976) (*Connecticut SFT*), and *Memphis American Federation of Teachers Local 2032 v. Board of Education*, 534 F.2d 699 (6th Cir. 1976) (*Memphis AFT*), upheld grants to a majority union of an exclusive right to use school meeting facilities and bulletin boards, as well as the internal mail system.

We are, of course, not bound by these cases, and their reasoning fails to persuade us. We hold that when the Perry Township school board opens its internal mail system to PEA but denies it to PLEA, it violates both the equal protection clause and first amendment as incorporated into the fourteenth.

To help place the issue in context, we begin by noting that similar behavior by a private employer subject to

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(N.D. Ill. May 14, 1976); *Federation of Delaware Teachers v. De La Warr Board of Education*, 335 F.Supp. 385 (D.Del. 1971); *Local 858, American Federation of Teachers v. School District No. 1*, No. 314 F.Supp. 1069 (D. Colo. 1970); *Maryvale Educators Association v. Newman*, 70 A.D. 2d 758, 416 N.Y.S. 2d 876, *appeal denied*, 48 N.Y. 2d 605, 424 N.Y.S. 2d 1025 (1979); *Geiger v. Duval County School Board*, 357 So.2d 442 (Fla. App. 1978); *Clark County Classroom Teachers Association v. Clark County School District*, 91 Nev. 143, 532 P.2d 1032 (1975) (alternative holding).

This tabulation does not include constitutional challenges by minority unions to exclusive rights that do not directly involve communication, such as a dues checkoff. Such challenges have uniformly been rejected. The leading case is *Bausch v. City of New York*, 21 N.Y. 2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951, *cert. denied*, 393 U.S. 834, 89 S.Ct. 108, 21 L.Ed.2d 105 (1968). Many of the cases cited in the preceding paragraph also involved such issues; *see also County Employees Local 22 v. County of Sacramento*, 28 Cal. App. 3d 424, 104 Cal. Rptr. 619 (1972). Although these cases invariably treat both sorts of exclusive right as equivalent, we think they may be distinguishable. *See* note 47 *infra*.

the National Labor Relations Act (NLRA)[8] would constitute an unfair labor practice. *NLRB v. Magnavox Co.*, 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974), struck down an employer's rule, authorized by its collective bargaining agreement, that prohibited employees from distributing literature to each other on the business premises and gave the incumbent union exclusive access to in-plant bulletin boards. The Court reasoned that the employees' right to criticize or to oppose a union, guaranteed by § 7 of the NLRA, implies that they have a nonwaivable right effectively to disseminate their opinions to other employees while on the business premises. As a corollary, the union's adversaries must have " 'equal access to and communication with their fellow employees' ". 415 U.S. at 326, *quoting NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968). Although *Magnavox* and the cases following it to date involved disciminatory bans on leafleting, posting of notices, or meeting on company property,[9] the principle of equal access established in *Magnavox* would seem applicable to a discriminatory grant of access to an employer's internal commu-

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[8] 29 U.S.C. §§ 151-169 (1976).

[9] *NLRB v. Northeastern University*, 601 F.2d 1208, 1217 (1st Cir. 1979); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320 (7th Cir. 1976); *NLRB v. Transcon Lines*, 599 F.2d 719 (5th Cir. 1979); *International Association of Machinists, & Aerospace Workers, District No. 9 v. NLRB*, 415 F.2d 113 (8th Cir. 1969); *Container Corp. of America*, 244 N.L.R.B. No. 53, at n.2 (1979); *Ford Motor Co. (Rouge Complex)*, 233 N.L.R.B. 698 (1977); *McDonnell Douglas Corp.*, 210 N.L.R.B. 280 (1974). *Cf. Teamsters Local 515 (Roadway Express, Inc.)*, 248 N.L.R.B. 83 (1980) (can forbid insurgents to post notices on union bulletin board when an equivalent facility—an adjacent bulletin board—is available); *General Motors Corp., Frigidaire Divison*, 240 N.L.R.B. 168 (1979) (suggests distinction between distribution of literature and posting of notices). *See also Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255 (7th Cir. 1980).

nications system.[10] With respect to communications relating to "mutual aid or protection" within the meaning of § 7—a term that has been interpreted broadly [11]—an employer therefore may not open one particularly effective channel of communication to certain employees or members of one labor organization and deny it to others.

The teachers of the Perry Township Schools, however, as employees of a municipality, are not covered by the NLRA,[12] and the Indiana Education Employment Relations Board, which administers the analogous Indiana statute governing labor relations in Indiana public school systems, has ruled that a school district may, as a matter of state law, grant a majority union the exclusive right to use school facilities to communicate with

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[10] Such discrimination cannot be justified on grounds of cost, for it is an unfair labor practice for an employer to "contribute financial or other support" to "any labor organization". National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1976). Some forms of assistance to union efforts to communicate with employees may be permissible "cooperation" rather than unlawful "support", but not assistance that discriminates against a disfavored union. *See, e.g., Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 170 (7th Cir. 1955); R. Gorman, Basic Text on Labor Law 200-03 (1976). Employers may ban on-site communication between employees where physically necessary for efficient business operations. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491-93, 301-05, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978); *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 801-03, 65 S.Ct. 982, 89 L.Ed. 1372 (1945). But if one labor organization is allowed to communicate through a particular channel, exclusion of others obviously cannot be justified by physical necessity.

[11] *E.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978) (criticism of federal and state labor laws protected); *General Motors Corp.*, 211 N.L.R.B. 986 (1974), *enforced in relevant part*, 512 F.2d 447 (6th Cir. 1975) (literature concerning candidates for intra-union election protected).

[12] *See* National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (1976).

teachers. *Pike Independent Professional Educators*, No. U-76-16-5350 (May 20, 1977).[13] Of course, we do not sit to judge the wisdom of that state policy, but only to ensure that it falls within the limits prescribed by the Constitution. "[T]he First Amendment is not a substitute for the national labor relations laws." *Smith v. State Highway Employees Local 1315*, 411 U.S. 463, 464, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979) (per curiam).

Still, it will not do to say, as some courts have said when faced with similar constitutional claims, that because this case involves the government only in its role as employer, it should be subject only to the constitutional restraints that would apply to a similarly situated private employer—that is to say, none.[14] That amounts to an argument that state action is not implicated when the government acts in a proprietary capacity, an argument that has lost favor in the courts.[15]

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[13] The Indiana Education Employment Relations Board qualified *Pike* by stating that it "expresses no opinion concerning the use of school facilities for meetings held by an exclusive representative for purposes other than for the discharge of the exclusive representative's duties of representing the bargaining unit and its individual members". But PEA's right of access here is not so limited; even if it were, that would not change the result. *See* page 28 *infra*.

[14] This case presents a problem of labor relations, and although the problem is in the context of public employment, this does not alter its essential character. Plaintiffs are a labor union and its officials and members, and they are seeking to utilize only those internal channels of school communication which are not traditionally of a public nature for the purpose of furthering the goals of their union. . . . Thus, we do not accept plaintiffs' characterization of the issue as one of alleged impairment of broad First Amendment rights.

Local 858, American Federation of Teachers v. School District No. 1, 314 F. Supp. 1069, 1075 (D.Colo. 1970), *quoted in, e.g., Connecticut SFT*, 538 F.2d at 480-81.

[15] *Gilmore v. City of Montgomery*, 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974); *City of Trenton v. New Jersey*, 262 U.S.

Indeed, the constitutional law of public sector labor relations is today a large and flourishing field. The due process clause limits the government's power to fire employees without a hearing,[16] the equal protection clause limits who may be employed and how employees may be hired and fired,[17] and the first amendment places a wide variety of restrictions on government labor practices. For example, the government may not forbid its employees to join a union,[18] compel them to finance political or ideological advocacy by their collective bargaining representative,[19] refuse to permit teachers other than

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182, 191-92, 43 S.Ct. 534, 67 L.Ed.2d 937 (1923). *See* Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233, 276. *But cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 303, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (plurality opinion) (justifying minimal first amendment scrutiny of city transit authority's refusal to accept political advertising or buses partly by analogy to the power of private news media to refuse such advertising).

[16] *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). *Cf. Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

[17] *E.g., Davis v. Passman*, 442 U.S. 228, 234-35, 99 S.Ct. 2264, 60 L.Ed.2d 346 (1979); *Personal Administrator v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *United Public Workers v. Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

[18] *Smith v. State Highway Employees Local 1315*, 441 U.S. 463, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979) (by implication); *Teachers Local 18954 v. Hanover Community School Corp.*, 457 F.2d 456, 460 (7th Cir. 1969) (Stevens, J.); *McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968).

[19] *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). The same result has been reached as a matter of statutory construction with respect to unions in the private sector subject to federal labor laws. *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), and the reasoning of *Abood* strongly suggests that that is a constitutional requirement.

union representatives to speak at open school board meetings,[20] fire employees solely because they publicly or privately criticize the the government,[21] condition certain types of employment on affiliation with the political party in power,[22] refuse employment to members of the Communist Party,[23] require employees to affirm belief in God,[24] or require them to file affidavits listing the private organizations to which they belong.[25] Of course, "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general". *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Thus, the government's interest in conducting its operations efficiently will justify such restrictions on the first amendment rights of its employees as are reasonably

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[20] *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976).

[21] *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[22] *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

[23] *Keyishian v. Board of Regents*, 385 U.S. 589, 605-10, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

[24] *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961).

[25] *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

necessary to that end.[26] Nevertheless, these cases demonstrate that the first amendment and the equal protection clause apply with full force to the government in its role as employer.

A.

The first step in constitutional analysis is to ascertain the applicable standard of review. The cases that have rejected constitutional challenges to similar exclusive access policies did so largely because they did not scrutinize the schools' justifications for those policies. *Memphis AFT*, for example, held that such a policy does not implicate the first amendment rights of the members of the minority union at all. Asserting that the policy neither regulated "the content or the subject matter of speech in the schools" nor "censored [nor] promoted a particular point of view", the court implicitly applied a right/privilege distinction to hold that because teachers have no absolute right to access to the mail system, the school board could open it to some teachers but not others without justification or limitation under the first amendment. 534 F.2d at 702. By contrast, *Connecticut SFT* recognized that an exclusive access policy may interfere with constitutionally-protected speech by the minority, but held that such interference does not violate the first amendment. Observing that the schools' communications facilities were not a public forum, that the minority union had alternative ways to communicate with teachers, and asserting that the minority's communications were of "limited public interest", the court ruled that those factors combined to render the interference with the minority's first amendment rights de minimis and negligible. 538 F.2d at 482. Equal protection scrutiny was no more exacting.

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[26] *E.g., United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564-65, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Pickering v. Board of Education*, 391 U.S. 563, 568, 569-70, 572-73 (1968).

Because the access restriction did not, in the view of the *Memphis AFT* court, implicate the first amendment rights of the minority union members or discriminate against a suspect class, the court held that the exclusive-rights policy had to pass only the superficial rational basis test. 534 F.2d at 703.[27]

With deference, we suggest that both *Memphis AFT* and *Connecticut SFT* erred by confusing the constitutional standards applicable to a rule that evenhandedly excludes all private communications from a particular government facility with the standards applicable to a rule that grants access to certain speakers or certain viewpoints and denies access to others. A challenge by an excluded speaker to the former sort of rule is a claim for absolute access; a challenge to the latter sort is a claim for equal access. An imprecise terminology makes it easy to confuse the two. Convention has established the term "public forum" to denote a facility that may not constitutionally be closed to all private expression, but the absence of a natural phrase to describe a facility that the government may not open only to certain speakers or viewpoints has led some courts to use the same or confusingly similar phrases in that context as well.[28] That is unfortunate, for the interests at stake in the two situations, and hence the appropriate standards of review, differ greatly.

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[27] *Connecticut* SFT avoided passing on equal protection claims by invoking the abstention doctrine. 538 F.2d at 483.

[28] As far as we can discern, the phrase "public forum" was first used in Professor Kalven's seminal article, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 Sup.Ct.Rev. 1. Loose use of the term has not always kept courts from applying the equal access principle correctly. *See, e.g., National Socialist White People's Party v. Ringers,* 473 F.2d 1010 (4th Cir. 1973); *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation,* 417 F.Supp. 632 (D.R.I. 1976); *Alaska Gay Coalition v. Sullivan,* 578 P.2d 951 (Alaska 1978).

Discriminatory treatment of speech on the basis of its content or on the basis of the identity of the speaker usually requires rigorous scrutiny because it presumptively violates the first amendment's primary and overriding proscription against censorship. Censorship, broadly defined as an attempt by the government to suppress the expression of disfavored points of view by private individuals, is a relative concept; it is defined by reference to the opportunities for expression open to favored or neutral viewpoints.[29] Contrary to *Memphis AFT*, it may easily take the form of amplifying favored or neutral speech, rather than of stifling the disfavored.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .
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> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself,

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[29] The limitation to "private individuals", while awkward, is necessary. Several commentators have recently pointed out that the *Mosley* equal access principle, in order to be workable, must be limited by a distinction between "unofficial speech", which should trigger the equal-access principle, and "legitimate official speech", which should not. A rule permitting only Democrats to give political speeches on a military base should be invalid, but the equal-access principle should not extend so far as to require viewpoints on military tactics other than those taught in the military classroom to be heard. *Cf. Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976). *See* Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 577-88 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863, 908-12 (1979). No theory has yet been developed for distinguishing between the two kinds of speech in close cases. *Compare Bonner-Lyons v. School Committee*, 480 F.2d 442 (1st Cir. 1973), *with Buckel v. Prentice*, 572 F.2d 141 (6th Cir. 1978). But because the school district here did not even purport to endorse PEA's messages or adopt them as its own—and indeed, required PEA to note its sponsorship on all of its messages, *see* note 1 *supra*—those messages must fall on the "unofficial" side of the line.

> government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more conventional views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and the government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking to some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Department v. Mosley, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). It is therefore irrelevant whether the Perry school board's access policy is characterized as discriminatorily opening a new channel of communications to PEA or discriminatorily closing a preexisting channel to PLEA. The essential issue is whether the discrimination is justifiable; the same standard of scrutiny applies in either case.

The standard applicable to this case is a high one. Despite the sweeping language of *Mosley* quoted above, other Supreme Court cases demonstrate that it is not invariably true that the government may never discriminate among constitutionally protected speech on the basis of its content or on the basis of the speaker, nor even that all such discrimination must always be scrutinized with equal strictness. Because a majority of the Court were unable to agree on any one rationale in some of these cases, it is not always easy to determine the appropriate standard of review. Even interpreting the cases in the way most favorable to the defendants, however, they require rigorous scrutiny to be applied here. Although not always made explicit, one of the most

important factors in determining the appropriate standard is the extent to which a given restriction has the effect of favoring the expression of a particular point of view on an identifiable issue more than would a content- and speaker-neutral restriction or no restriction at all.[30] The restriction challenged here does substantially favor one viewpoint in that sense, and so it is valid only if it is "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized". *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2280, 65 L.Ed.2d 263 (1980).

The decisive importance of viewpoint neutrality is illustrated by the cases dealing with so-called "subject matter restrictions": content discrimination based on the subject matter of expression in a particular setting.[31] In both *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), and *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (plurality opinion), the Court applied a relatively deferential standard of review to rules forbidding political expression in, respectively, a military base and a municipal bus system; so too in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion), which involved a

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[30] *See, e.g., First National Bank v. Bellotti*, 435 U.S. 765, 785-86, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.") (footnote omitted); *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 544-48 (1980) (Stevens, J., concurring in the judgment).

[31] *See also, e.g., Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980). *See generally* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

zoning ordinance that was particularly restrictive for theatres exhibiting non-obscene but sexually explicit films. By contrast, the Court scrutinized other subject matter restrictions much more stringently in *Mosley and Carey*, both of which involved ordinances banning all but labor picketing in certain areas, as well as in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980), which involved an administrative order prohibiting public utilities from including in their monthly bills to customers any inserts discussing "controversial issues of public policy". These two sets of cases may be reconciled by noting that the stricter standard of review was applied in cases where the restriction was not viewpoint-neutral in the sense defined above.[32] The predictable and intended effect of the order challenged in *Consolidated Edison Co.* was to prevent electrical utilities from extolling the virtues of nuclear power, and the labor exceptions involved in *Mosley* and *Carey* favored labor against management more than would a complete prohibition on picketing. By contrast, the restrictions involved in *Greer* and *Lehman* had no readily discernible tendency to favor particular types of political candidates or political doctrines; and the plurality opinion in *Young* stressed that the challenged zoning restriction on theatres exhibiting sexually explicit films was neutral with respect to the ideas or viewpoint conveyed by those films. 427 U.S. at 70.[33] Viewpoint-neutrality also helps

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[32] *See* note 35 *infra*.

[33] *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (plurality opinion). These are, of course, questions of degree to a certain extent. Every restriction on speech implicitly favors the status quo; and "the speech suppressed by restrictions such as those involved in . . . *Young* will almost invariably carry an implicit, if not an explicit, message in favor of more relaxed sexual mores." Stone, *supra* note 31, at 111-12.

explain why speech restrictions keyed to the identity of the speaker are always scrutinized strictly: they almost invariably are not neutral with respect to the viewpoints they tend to disfavor. Indeed, the fact that the Supreme Court has never distinguished sharply between speaker discrimination and impermissible subject matter restrictions, as illustrated by the passage from *Mosley* quoted above, itself tends to indicate that the same fundamental evil underlies both.[34]

This is not to say that lack of viewpoint-neutrality is a necessary condition for vigorous scrutiny of content or speaker discrimination; the Speech Clause guards other values with comparable intensity.[35] But it is at least a

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[34] *See First National Bank v. Bellotti*, 435 U.S. 765 (1978), and *Consolidated Edison Co.*, each of which involved restrictions on both speaker and subject matter. *See also City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.8 (1976), in which the Court struck down a non-viewpoint-neutral speaker restriction on speech at an open school board meeting, but noted that a (viewpoint-neutral) subject matter restriction would be permissible.

[35] For example, the individual interest in self-expression may require speaker restrictions to be scrutinized rigorously in any case, *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978). Similarly, even viewpoint-neutral subject matter restrictions may require heightened scrutiny in some circumstances. Indeed, the opinions in *Carey*, *Mosley*, and *Consolidated Edison Co.* rejected subject matter restrictions as impermissible attempts to treat some kinds of constitutionally-protected speech as less valuable than others; they do not even allude to the fact that the restrictions were also non-viewpoint-neutral. We have chosen to emphasize their viewpoint-neutrality aspect because *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *Young*, *Lehman* and *Greer* arguably recognize just such a hierarchy of speech protection in some circumstances. *Consolidated Edison Co.* rejected such a reading of *Lehman* and *Greer* on the ground that those cases involved speech on government property, 447 U.S. at 539-40, and *Young*, *Pacifica* and *Lehman* each involved some degree of audience captivity. But both of those factors should go to justification, not

sufficient condition. No case has applied any but the most exacting scrutiny to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue. The access policy adopted by the Perry schools, in form a speaker restriction, favors a particular viewpoint on labor relations in the Perry schools in just such a manner: the teachers inevitably will receive from PEA self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by the PLEA. It must therefore be rigorously scrutinized.

Although this discussion is couched in terms of the first amendment, the same standard of review may be derived from the equal protection clause. Equal protection analysis may broadly be said to fall into a familiar two-tiered pattern: government classifications that impinge on fundamental rights and classifications along suspect lines must be closely tailored to meet a compelling state interest, but other classifications need only be rationally related to a legitimate state interest. *E.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Because free speech is a fundamental right, and because discrimination between speech or speakers, to the extent that it operates as a form of censorship, implicates that right, the fundamental rights strand of strict scrutiny applies to such discrimination. The peculiar identity of equal protection and first amendment analyses in differential access cases follows logically from the explicit constitutional designation of speech as fundamen-

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to the standard of review—and the Court apparently did apply a weaker than normal standard of review in all four cases. We need not attempt to resolve this apparent conflict here, and so the minimal reading we give to *Carey*, *Mosley* and *Consolidated Edison Co.* in the text of this opinion should not be taken as intimating that we would reject their broader reading in a case involving a viewpoint-neutral subject matter restriction.

tal and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee.[36] Thus, although *Mosley* evidently was the first case explicitly to apply the equal protection clause to differential access cases, the analytic tools of equal protection strict scrutiny—the requirements of a relatively important state interest, a close fit between end and means, and use of the least restrictive alternative—were applied to content discrimination under the aegis of the first amendment long before then.[37]

In principle, of course, the stringency with which these tools should be applied could vary between the first amendment and equal protection clauses. The strictness of the scrutiny applied under the fundamental rights strand of equal protection does in fact vary in different contexts; there seems to be more than a verbal difference between the "necessary to promote a compelling state interest" test, applied to certain restrictions on the fundamental right to equal treatment in the voting

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[36] The differences between the fundamental rights strand of equal protection and a substantive constitutional guarantee are debatable even outside this context. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 391-96, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (Stewart, J., concurring in the judgment); *Shapiro v. Thompson*, 394 U.S. 618, 658-62, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (Harlan, J., dissenting). *See generally* Comment, *Equal Protection and Due Process: Contrasting Methods of Review Under the Fourteenth Amendment*, 14 Harv. C.R.-C.L. L. Rev. 529 (1979).

[37] On important interest and least restrictive means, *see, e.g., Martin v. City of Struthers*, 319 U.S. 141, 148, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Schneider v. State*, 308 U.S. 147, 162, 60 S.Ct. 146, 84 L.Ed. 155 (1939). *See generally* Comment, *Less Drastic Means and the First Amendment*, 78 Yale L.J. (1969). On closeness of fit, *see, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

process,[38] and the "closely tailored to an important state interest" test, applied by *Carey*, *Mosley*, and *Consolidated Edison Co.* to non-viewpoint-neutral content and speaker discrimination. It should not be surprising that the strictness of fundamental rights scrutiny may vary with the particular right in question, just as the strictness of the scrutiny applied under the suspect classification strands may vary as the classification is fully suspect, such as race, or only semi-suspect, such as gender.[39] But, as also illustrated by the passage quoted from *Mosley*, the Supreme Court has alluded to the first amendment and the equal protection clauses almost indiscriminately in cases involving discrimination in access to communications facilities.[40] In this case, therefore, there is no substantial difference between the standards of review required by those two constitutional provisions.[41]

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[38] *E.g.*, *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969). *See also Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (same standard applied to residency requirement burdening the right to travel); *Storer v. Brown*, 415 U.S. 724, 733, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) ("compelling state interest" needed to restrict right to run for office).

[39] *E.g.*, *Califano v. Wescott*, 443 U.S. 76, 85, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

[40] *See Carey v. Brown*, 447 U.S. 455, 460, 461, 466, 471 (1980); *First National Bank v. Bellotti*, 435 U.S. 765, 774 n.8 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 n.27 (1976) (plurality opinion), *quoting* Kalven, *supra* note 28, at 29; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). *Cf. Carey v. Brown*, 447 U.S. at 471-72 (Stewart, J., concurring) (insisting that *Mosley* and *Carey* rest only on the first amendment, but not explaining why). *See also* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117, 141 n.157 (1975).

[41] An alternative ground for strict scrutiny in this case might be derived from the "suspect classification" strand of equal protection, however. If strict scrutiny of suspect classifications is meant

It is irrelevant to application of the viewpoint-neutrality principle that the school district's internal

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to protect those who cannot adequately protect themselves in the political arena, *see United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); *see generally* J. Ely, Democracy and Distrust 135-75 (1980), then PLEA arguably qualifies for particular judicial solicitude. PLEA had no effective way to influence the collective bargaining process that resulted in the exclusive-access policy, since Indiana law made PEA the *exclusive* bargaining representative of the teachers. And, because of the school board's natural interest in quiet and stable labor relations, and PEA's natural interest in self-perpetuation, neither was in a position to assess the costs and benefits of the exclusive-access rule in a disinterested manner or motivated to preserve the institutional interests of the minority. If a bargaining representative is "clothed with power not unlike that of a legislature" over the members of its bargaining unit, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198, 65 S.Ct. 226, 89 L.Ed. 173 (1944), it is a legislature in which the institutional interests of the members of a minority union are, by design, peculiarly underrepresented. It may seem novel to apply suspect classification analysis to groups other than those that have suffered society-wide discrimination simply because they are underrepresented at the point of decision, *cf.* Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1787-88 (1975), but novelty alone is no objection. Indeed, the case for suspect classification analysis here is stronger than usual in that one important theoretical problem does not apply: it may be difficult to distinguish a "discrete and insular" minority from a mere loser in the political process in some cases, but not here, where the losers are under a de jure handicap. The most significant argument against suspect classification analysis is that minority unions are not systematically disadvantaged from seeking change before the Indiana legislature. But an analogous argument has been rejected in analysis of voting restrictions in elections to political subdivisions. *Kramer v. Union Free School District*, 395 U.S. 621, 628 (1969). *Cf., e.g., Ball v. James*, 68 L.Ed.2d 150 (1981) (one-man, one-vote principle need not be followed in elections to special-purpose state agency). *Ball* is distinguishable in that it rejected a claim that the *structure* of the agency's decisionmaking process was unconstitutional; it does not imply that particular actions by the agency that discriminate against underrepresented interests should not be searchingly examined. *See also* note 47 *infra*.

mail system is not a public forum in the exact sense of the term. That is, we may assume that the Constitution would not prohibit the school district from closing its internal mail system to all unofficial communications if it chose. The public forum doctrine is a manifestation of the first amendment's independent proscription against government regulation that unnecessarily constricts opportunities for expression, even if viewpoint-neutral. If viewpoint-neutrality is an equal protection guarantee, the public forum doctrine is its substantive due process analogue.[42] But while content neutrality is an all-pervasive restriction, the public forum doctrine, because of its more sweeping consequences and potentially limitless application, has been carefully restricted to guarantee unofficial access only to government property or facilities of a sort that traditionally have been open to public expression, *Greer v. Spock*, 424 U.S. 828, 835-36 (1976), *quoting Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.), or whose normal use plainly will not be interfered with by such expression, *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Brown v. Louisiana*, 383 U.S. 131, 142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (plurality opinion).

Many cases demonstrate that the obligation of viewpoint neutrality applies to discriminatory access restrictions whether or not the facility could be completely closed to unofficial communications. For example, a school classroom is not a public forum, but *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 510-11, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), struck down a rule prohibiting students from wearing

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[42] *See generally* Kalven, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975); Note, *supra* note 40; Stone, *supra* note 15.

armbands in protest of the Vietnam War in part because the school did not prohibit the wearing of other symbols of political significance. *Greer v. Spock*, 424 U.S. 828, 838-39 (1976), upheld a general access restriction applied to prohibit a politician from speaking on a military base, but the Court took care to note that the rule had been applied evenhandedly to all political speakers. In particular, courts have not hesitated to apply the viewpoint-neutrality principle to public schools' internal mail systems and other school facilities even though they are not public forums—outside the context of school labor relations, at least. *Bonner-Lyons v. School Committee*, 480 F.2d 442 (1st Cir. 1973), for example, forbade a school board from disseminating to students and parents messages critical of forced busing unless proponents were given equal access to the schools' message distribution system. *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc), required a school board to rent its school auditorium to a racially discriminatory political party because the auditorium was available to other private organizations.[48] We see no reason why the first amendment and equal protection rights of the members of a legitimate teachers' union, or of other teachers, should be weaker than the rights of Klansmen.

Connecticut SFT asserted that a low standard of scrutiny should apply to a minority union's equal access claim in part because its communications were thought to be of "limited public interest". 538 F.2d at 481. *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), contradicted that statement in discussing the comparative first amendment

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[48] *See also, e.g., Knights of the KKK v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978); *Gay Students Org. v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Hennessey v. Independent School District No. 4*, 552 P.2d 1141 (Okla. 1976).

rights of members and non-members of a majority union in the course of analyzing the constitutionality of an agency shop arrangement in a public school system. First, it is doubtful, to say the least, that communications critical of the incumbent union or of school operations by a minority union or individual teachers really are of limited public interest; *Abood* held it a "truism" that "because public employee unions attempt to influence government policymaking, their activities—and the views of members who disagree with them—may properly be termed political". 431 U.S. at 231. More fundamentally, even if such communications could fairly be characterized as being of interest only to the teachers themselves, that fact is irrelevant. As *Abood* also pointed out, the Supreme Court has "never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection". *Id.* (footnote omitted). The first amendment does not enact Alexander Meiklejohn's *Free Speech and its Relation to Self-Government* any more than the fourteenth enacts Herbert Spencer's *Social Statics*. It is true that at least two recent opinions—each by a badly divided Supreme Court—look to a "two level" theory of the first amendment, in which certain communications protected by the first amendment in the sense that they cannot constitutionally be banned outright may nevertheless be prohibited from certain channels of communication on the basis of their content.[44] But both of those cases involved virtually idealess near-obscenity, on the fringe of first amendment protection. By contrast, PLEA's criticisms of PEA and its efforts to persuade teachers to enter its ranks and, ultimately, to influence

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[44] *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion). *See* notes 33, 35 *supra*.

school operations are, if not at the very apex of any hierarchy of protected speech, at least not far below it.

Finally, the fact that PLEA has alternative ways to communicate with the teachers does not weaken the applicable standard of review. The oft-cited general rule is that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place". *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939). Of course, if read for all it is worth, this statement is patently false; the effect of even the most innocuous time, place, or manner restriction is to do precisely that. But, properly interpreted, the *Schneider* rule does stand for an important truth: the existence of alternative channels of communication will not *alone* justify a restriction on one channel. Such a restriction must always have an independent justification; restrictions keyed to the speaker or to the content of the message delivered must still be scrutinized.[45] The only effect of the existence of alternative channels of communications is to lessen the weight of the state interest necessary to justify a restriction on a particular channel, and only to the extent that other channels are as effective as the restricted channel.

The other channels of communication here available to PLEA, however, are not nearly as effective as the internal mail system. "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees", *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), and off-campus communication by PLEA to

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[45] *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 541 n.10 (1980); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

the teachers of Perry Township would either be expensive, if through the public mails, or cumbersome, if through mass telephoning. Its opportunities for communication on the school premises are also decidely inferior to the internal mail system. Hand distribution of written materials and speaking with individual teachers are far more arduous and time-consuming; literature left in the teachers' lounge and bulletin board messages are more likely to be missed by persons not deliberately seeking them; bulletin board messages and public address announcements cannot convey much detail; and meetings on school property after school hours only permit PLEA to preach to the converted. Indeed, the defendants' attempt to justify the mail access restriction as necessary to ensure labor peace, discussed below, itself further demonstrates the inadequacy of these other methods of communication, for if PLEA's use of these methods does not threaten labor peace, that is only because they are less effective than the mail system in stirring up support for it. Because these methods are materially less effective than the mail system, their existence does not weaken the appropriate standard of review.

B.

Given that the exclusive access policy must be closely tailored to an important state interest, the defendants' attempts to justify it must be rejected. Their arguments fall into two categories. First, they assert that discrimination in favor of the incumbent union is justified because the incumbent has legal duties to the teachers with respect to bargaining and contract administration that other unions and individuals do not have, and which require it to have an efficient method of communicating with the teachers. Second, citing *Memphis AFT*, they suggest that the access restriction is necessary to ensure "labor peace" in the school system.

That PEA has legal duties to the teachers that PLEA does not have does not justify the exclusive access policy. The access policy presently in force is both overinclusive and underinclusive with respect to that asserted justification: overinclusive, because the collective bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties, and hence does not exclude messages simply critical of PLEA; underinclusive, because the school district permits outside organizations with no special duties to the teachers to use the system. Even if the board had attempted to tailor its access policy more closely to that justification, by excluding all private communications but PEA's and limiting PEA to messages directly related to its special duties, the fit would still be questionable, for it might be difficult—both in practice and in principle—effectively to separate "necessary" communications from propaganda. More fundamentally, we hold that such an exclusive access policy would be invalid even aside from questions of fit because it furthers no discernible state interest. PLEA does not argue that the school district has no legitimate interest in allowing PEA to use the mail system, but rather that the school district has no interest in making PEA's use *exclusive*. Without an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone. The defendants do not contend that equal access for others would impose significant additional expenses on the school district, nor that it would interfere with PEA's execution of its duties as bargaining representative in any way.[46]

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[46] *Cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), which granted a claim for access to a municipal theatre by the promoter of a controversial production. Although *Conrad* rested mainly on the city's failure

Nor can the access policy be defended as designed to preserve labor peace. It is true that the state's compelling interest in educating the students attending its public schools permits it to prohibit behavior that "materially and substantially disrupt[s] the work and discipline of the school". *Healy v. James*, 408 U.S. 169, 189, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), *paraphrasing Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969); *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972). But "[i]n making this showing, the administration must rely on reasonable inferences drawn from concrete facts, not on the mere apprehension or speculation that disturbances or interferences with appropriate discipline will occur". *Connecticut SFT*, 538 F.2d at 478. *See Tinker*, 393 U.S. at 508-09; *Healy*, 408 U.S. at 189-91. The defendants here point to no specific interference with school operations that is likely to result from use of the mail system by PLEA, and we can infer none. There is no indication that PLEA intends imminently to incite a work stoppage, for example. Nor is there any reason to suppose that the mere dissemination of PLEA's messages to hostile members of PEA is more likely to provoke disruptive conflicts between members of the rival unions than PEA's ongoing dissemination of its messages to

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to follow the procedural requirements necessary for a valid prior restraint, the holding also seems to imply a substantive right of equal access. *Conrad* leaves unclear the scope of the state's power to edit with respect to state-owned facilities that can only be used by a limited number of persons. Note, however, that the argument for access in this case is much stronger than in *Conrad*, because there is no effective limit on the number of people who can simultaneously use the mail system; the marginal cost of delivering additional messages is nil. *See generally* Karst, *Public Enterprise and the Public Forum: A Comment on* Southeastern Promotions, Ltd. v. Conrad, 87 Ohio St. L.J. 247 (1979); Comment, *Access to State-Owned Communications Media—The Public Forum Doctrine*, 26 U.C.L.A. L. Rev. 1410 (1979).

hostile members of PLEA. Indeed, face-to-face arguments in the teachers' lounges, which the defendants urge as an alternative method of communication open to PLEA, must be far more apt to disrupt than the impersonal delivery of its easily-discarded tracts. Finally, even apart from the requirements of specific pleading and proof, the labor peace argument fails because any discord PEA's communications may cause cannot "materially and substantially" disrupt the teaching process within the meaning of *Tinker* and *Healy*. Passions could hardly run higher over this labor dispute than they did over the wisdom of American involvement in Vietnam in 1965, symbolic speech about which the Supreme Court held protected in the classroom itself in *Tinker*.

III.

Because the school board's grant to PEA of an exclusive right to use the internal mail system must be searchingly examined and because the board has failed adequately to justify it, we hold that it violates the first amendment and equal protection rights of the teachers who belong to PLEA. We stress the scope and limits of that holding. It is premised entirely on the discrimination between members of PEA and other teachers; at no point did we rely solely on the fact that the school district permits outside organizations to use the mail system. On the other hand, we do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses. Furthermore, it does not follow that a school board that opens the system to a majority union may place no restrictions at all on who may use it or the content of the messages that pass through it. The school's interest in keeping outsiders off campus during school hours doubtless supports appropriate restrictions on entry for the purpose of using the mail system, and a

school certainly would not be compelled to distribute literature inciting its teachers to participate in an illegal strike, for example. On a more refined level, we have no occasion to consider the validity of content or speaker restrictions that are relatively neutral with respect to viewpoint, such as a restriction of unofficial access to messages about school operations or labor relations, or an exclusion of commercial advertisements or political messages unrelated to school operations. Finally, we are not faced with and do not address the constitutional questions that may arise from a public employer's grant to a majority union of exclusive rights other than of access to communications facilities, such as a dues checkoff.[47]

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[47] It is arguable that a dues checkoff for the majority union alone would unconstitutionally chill the minority's right to associate or violate their equal protection rights. *See* nn. 7, 18 *supra*. But because a discriminatory checkoff would not directly interfere with speech, it arguably should be subject to a much less stringent standard of review. *Cf. City of Charlotte v. Local 660, International Association of Firefighters*, 426 U.S. 283, 96 S.Ct. 2036, 48 L.Ed.2d 636 (1976) (applying rational basis scrutiny to reject equal protection attack on city's refusal to grant checkoff for union while providing checkoff for certain other programs and organizations). *Charlotte* held rational the city's distinction between programs in which all employees could, without more, participate, and organizations such as a union, a checkoff for which would only benefit union members. Note that that distinction would not exist as between competing unions, unless an agency shop arrangement were in force. *See also* note 41 *supra*, the reasoning of which suggests that *any* exclusive-rights provision in a public-sector collective bargaining agreement in favor of an incumbent union is a candidate for heightened scrutiny. Such a provision could be valid if it serves an important purpose, as with provisions affirming the principle of exclusive representation itself, or as with an exclusive dues checkoff provision coupled with an agency shop arrangement, which has the permissible goal of eliminating "free riders", *see Abood v. Detroit Board of Education*, 431 U.S. 209, 221-23 (1977); but an exclusive checkoff provision not coupled to an agency shop would seem difficult to justify.

The decision of the district court is reversed, and this case is remanded for proceedings in conformity with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 14, 1981

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. JOHN MINOR WISDOM, Senior Circuit Judge *
HON. THOMAS E. FAIRCHILD, Circuit Judge

No. 80-1420

PERRY LOCAL EDUCATORS' ASS'N, EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs-Appellants

vs.

WILLIAM HOHLT, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. IP 79-C-189 James E. Noland, Judge

ORDER

On consideration of the petition for rehearing and response thereto, the panel opinion was thereafter circulated to all active members of this Court under Circuit Rule 16(e) to determine whether they wished to rehear the matter *en banc*. All of them voted to deny a rehearing *en banc*, and the panel voted to deny a rehearing.

Therefore, the petition for rehearing with the suggestion for rehearing *en banc* is hereby DENIED.

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* The Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 79-189-C

PERRY LOCAL EDUCATORS ASSOCIATION, *et al.*

vs.

WILLIAM HOHLT, *et al.*

ORDER

This cause is before the Court upon cross motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Whereupon the Court, having considered the motions and the memoranda and materials filed in support thereof and opposition thereto, and now being duly advised in the premises, hereby finds that there is no genuine issue as to any material fact and that the defendants are properly entitled to a summary judgment in their favor as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendants' motion for summary judgment be, and the same hereby is, GRANTED.

DATED this 25th day of Feb., 1980.

/s/ James E. Noland
JAMES E. NOLAND
U.S. District Judge

MEMORANDUM ENTRY

This action arises out of a dispute over the use of the School mail system and teacher mailboxes in the Perry Township Schools. Basically, plaintiffs assert that the exclusive right to use these facilities was granted to defendant Perry Education Association, (PEA), the duly elected bargaining representative for Perry Township teachers, by defendant members of the Board of Education of the Metropolitan School District of Perry Township (School Board) in violation of plaintiffs' first and fourteenth amendment rights under the United States Constitution. Jurisdiction is founded upon the provisions of 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343 (3) and (4).

From the briefs, affidavits, and admissions on file in this case, it appear that defendant Perry Education Association, as exclusive bargaining representative, negotiated a contract with the School Board, one of the terms of which gave PEA the sole right to utilize the interschool mail delivery system and teacher mailboxes. Plaintiff Perry Local Educators' Association (PLEA), a rival teacher group, objected to the restriction placed upon its use of the teacher mailboxes and delivery system, claiming violation of first amendment freedoms and fourteenth amendment equal protection doctrines. The challenged restrictions applied solely to the mailboxes and school mail system, and did not prohibit union notices or communication among PLEA members by way of school bulletin boards, meeting rooms, public address system, word of mouth, telephone, or U.S. Mail. Defendants in their motion for summary judgment argue that the restrictions upon use of the mail factilities constitute only a *de minimus* encroachment, if any, upon plaintiff's first amendment rights, and that any burden upon such rights is justified by the state's interest in promoting labor harmony. In addition, defendants assert that the equal

protection provisions of the fourteenth amendment dictate only that those similarly situated by treated in like fashion. Thus, defendants argue, in view of the very different status of PEA and PLEA as majority and minority unions, respectively, disparate treatment of the type challenged in this case is completely proper.

Plaintiffs have moved for summary judgment in their favor as well, and in the alternative claim that several issues of material fact exist which render disposition of the case by way of summary judgment inappropriate. Specifically, they allege issues as to the existence of "labor disharmony" within the Perry Township schools; whether such disharmony or potential therfor is sufficient to constitute a compelling state interest, thereby justifying the complained-of restrictions; whether plaintiffs' activities, if they were permitted to utilize the teacher mailboxes, would constitute "union activities," so as to justify the challenged curtailment in the interest of labor peace; and whether or not the teacher mailboxes and mail system constitute a public forum. After reviewing the record before it, the Court is convinced that the foregoing either do not in fact remain at issue in the present action, or that they are not material so as to preclude a grant of summary judgment.

It is unquestioned that teachers may not be required to check their constitutional rights outside the "schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733 (1969). However, the exercise of first amendment rights is subject to reasonable regulation. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968). The question presented by plaintiffs' first amendment claims is whether or not there is a real abridgement of the rights of free speech under the facts of this case. *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448 (1949). It is the conclusion of the Court that defendants' "mailbox policies" do not

constitute an infringement upon plaintiffs' speech and associational rights. This conclusion finds support in a case remarkably similar to the present action, *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2d Cir. 1976), in which members of a minority teacher's union challenged restrictions placed upon their access to a school's internal channels of communication. The restrictions upon communication in *Connecticut State Federation of Teachers* were far more extensive than those presently under consideration, prohibiting use of bulletin boards and lounges in addition to teacher mailboxes. Nevertheless, the Court found no invasion of first amendment privileges, citing the non-public nature of the facilities and the availability of alternative communications opportunities as bases for its decision. 538 F.2d at 479-82. In regard to the non-public nature of the restricted communication facilities, the Court stated:

> [T]he school mailboxes, bulletin boards, and meeting rooms which appellants seek to use for First Amendment speech and associational activities are not public fora. They are unlike a street, sidewalk, park, or other similar place so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot constitutionally be denied . . . . Nor do they resemble a "public thoroughfare" so as to make them an appropriate place for the exercise of First Amendment rights.

538 F.2d at 480. This characterization of the mailbox facilities is equally applicable in the present case. The fact that the facilities are occasionally utilized for more personal, as opposed to school or union-related, communication among teachers, is of little import. Their normal and intended function is to facilitate internal communication of school-related matters to the teachers. "De-

fendants have no constitutional obligation *per se* to let any organization use the school mailboxes . . . to communicate its views to the teachers . . . whether or not the subject matter of the communication is school-related." *Id.* at 481.

Nor does the Constitution prohibit defendant PEA, as the duly-elected exclusive bargaining agent for all teachers in the Perry Township schools, from negotiating a contract benefit in the form of an exclusive use provision, especially where that provision is as narrow in scope as the one under scrutiny here, and where numerous avenues of communication, in the form of bulletin board notices, public address announcements, meetings on school property, informal conversation, telephone, and U.S. Mail remain open to plaintiffs. In short, the restrictions placed upon the use of facilities not open to the general public, designed to transmit communications of limited public interest, and supplemented by numerous alternative means of communcation by PLEA members are "so inconsequential that . . . [they] cannot be considered an infringement of First Amendment rights of free speech." *Id.* Defendant's motion in regard to the first amendment claims is thus well-taken.

Insofar as plaintiffs' equal protection claims are concerned, the Court believes that defendants must also prevail as a matter of law. The equal protection clause requires only that the government treat persons or groups similarly situated in a like fashion, or, stated in another way, the government must not accord disparate treatment to persons placed in different classes on the basis of criteria wholly unrelated to legitimate governmental objectives. *See Schlesinger v. Ballard*, 419 U.S. 498, 508-10 (1975); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

Plaintiffs contend that the restrictions upon their use of the school mail system amount to a denial of equal

protection by depriving plaintiffs of first amendment speech and associational rights without placing concomitant burdens upon members of defendant PEA. Two tests exist for determining whether an unconstitutional denial of equal protection has taken place. The Court in *Local 858 of the American Federation of Teachers v. School District Number 1*, 314 F.Supp. 1069 (D. Co. 1970) summarized these as follows:

> Where the classification allegedly violated equal protection is challenged as being irrational, it satisfies the Constitution if there exists a rational relationship between the distinction and constitutionally permissible objectives. McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101 . . . (1969). However, where the classification allegedly circumscribes the exercise of a constitutional right, it is unconstitutional unless shown to be necessary to promote a compelling state interest. Shaprio v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322 . . . (1969).

314 F. Supp. 1077. Having determined that the denial of access to the school mail system did not constitute more than a *de minimus* infringement upon plaintiffs' first amendment rights, the Court must apply the rational relationship test to the facts to determine the existence of an equal protection violation. In view of the very different status of defendant PEA as the recognized collective bargaining representative for *all* Perry Township teachers, and PLEA, as a rival teacher group, the Court believes that as a matter of law, plaintiffs have not been denied equal protection rights. This is because the contested communicative privileges accorded PEA as bargaining representative bear a rational relationship to the goal of labor peace within the schools and school system. As the Court in *Memphis American Federation of Teachers, Local 2032 v. Board of Education*, 534 F.2d 699 (6th Cir. 1976) concluded:

> Special privileges accorded to . . . [the majority employee organization] were based solely upon its status as a majority representative and as such were rationally related to the goal of labor peace.

534 F.2d at 703. PEA, as the bargaining voice for all Perry Township teachers, is thus entitled to the benefit of the limited privileges it negotiated in that capacity. Plaintiffs can make no such claim of entitlement or contractual privilege. Accordingly, defendants as a matter of law must prevail in regard to the equal protection claims.

Plaintiffs in Count III of the complaint assert interests under the provisions of *Ind. Code* § 20-7.5-1-1, the "intent" provision of Indiana's Certified Educational Employee Bargaining Act, *Ind. Code* §§ 20-7.5-1-1 through 14 (1976). That statute creates no interests beyond those encompassed by the preceding resolution of the constitutional issues. Accordingly, defendants' motion for summary judgment will be granted. The foregoing constitutes the Court's findings and conclusions in this matter.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 79-189-C

PERRY LOCAL EDUCATORS ASSOCIATION, EVELYN E. WADDELL, and JUDITH M. DIETRICH

vs.

WILLIAM HOHLT, ROBERT BUSH, THOMAS COAHRAN, JAMES STAINBROOK, JR., and RICHARD A. POPPA, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana, and PERRY EDUCATION ASSOCIATION

JUDGMENT ENTRY

This cause came before the Court upon cross motions for summary judgment. The Court, having examined said motions together with the memoranda and materials filed in support thereof and opposition thereto, and having granted the defendants' motion together with a memorandum entry thereon, hereby ENTERS JUDGMENT in favor of defendants and against the plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the plaintiffs take nothing from defendants by way of this action, and that costs be borne accordingly.

DATED this 25th day of Feb., 1980.

/s/ James E. Noland
JAMES E. NOLAND
U.S. District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1420

PERRY LOCAL EDUCATORS' ASS'N, *et al.*,
Plaintiffs-Appellants,

v.

WILLIAM HOHLT, *et al.*,
Defendants-Appellees.

CORRECTED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendant-appellee Perry Education Association hereby appeals to the Supreme Court of the United States from the decision and judgment of this Court entered in this action on June 24, 1981, petition for rehearing denied August 14, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Corrected Notice of Appeal To The Supreme Court of the United States" was served by first-class mail, postage prepaid this 4th day of November, 1981 to the following:

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APPENDIX F

EXCERPTS FROM INDIANA'S PUBLIC LAW 217, AS AMENDED, ESTABLISHING THE RIGHTS OF CERTIFICATED EMPLOYEES TO ORGANIZE AND BARGAIN COLLECTIVELY WITH SCHOOL CORPORATIONS

(Ind. Code Ann. § 20-7.5-1)

Sec. 20-7.5-1-1. Intent.—The Indiana General Assembly hereby declares that:

(a) the citizens of Indiana have a fundamental interest in the development of harmonious and cooperative relationships between school corporations and their certificated employees;

(b) recognition by school employers of the right of school employees to organize, and acceptance of the principle and procedure of collective bargaining between school employers and school employee organizations, can alleviate various forms of strife and unrest;

(c) the State has a basic obligation to protect the public by attempting to prevent any material interference with the normal public school educational process;

(d) the relationship between school corporation employers and certificated school employees is not comparable to the relation between private employers and employees among others for the following reasons: (i) a public school corporation is not operated for profit but to insure the citizens of the State rights guaranteed them by the Indiana State Constitution; (ii) the obligation to educate children and the methods by which such education is effected will change rapidly with increasing technology, the needs of an advancing civilization and requirements for substantial educational innovation; (iii) the Indiana General Assembly has delegated the discretion to carry out this changing and innovative educational

function to the local governing bodies of school corporations, composed of citizens elected or appointed under aplicable law, a delegation which these bodies may not and should not bargain away; and (iv) public school corporations have different obligations with respect to certificated school employees under constitutional and statutory requirements than private employers have to their employees.

Sec. 20-7.5-1-2. Definitions.—As used in this chapter:

(a) "school corporation" means any local public school corporation established under Indiana law and, in the case of public vocational schools or schools for handicapped children established or maintained by two or more school corporations, shall refer to such schools.

(b) "governing body" shall mean the board or commission charged by law with the responsibility of administering the affairs of the school corporation.

(c) "school employer" means the governing body of each school corporation and any person or persons authorized to act for the governing body of the school employer in dealing with its employees.

* * * *

(k) "school employee organization" means any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their school employer, and includes any person or persons authorized to act on behalf of such organizations.

(l) "exclusive representative" means the school employee organization which has been certified for the purpose of this chapter by the board or recognized by a school employer as the exclusive representative of the employees in an appropriate unit as provided in Sec. 10 of this chapter, or the person or persons duly authorized to act on behalf of such representative.

(m) "board" means the Indiana education employment relations board provided by this chapter.

(n) "bargain collectively" means the performance of the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to negotiate in good faith with respect to items enumerated in Sec. 4 of this chapter and to execute a written contract incorporating any agreement relating to such matters; provided, however, that such obligation shall not include the final approval of any contract concerning these or any other items. Agreements reached through collective bargaining are binding as a contract only if ratified by the governing body of the school corporation and the exclusive representative. The obligation to bargain collectively does not require the school employer or the exclusive representative to agree to a proposal of the other or to make a concession to the other.

(o) "discuss" means the performance of the mutual obligation of the school corporation through its superintendent and the exclusive representative to meet at reasonable times to discuss, to provide meaningful input, to exchange points of view, with respect to items enumerated in Sec. 5 of this chapter. This obligation shall not, however, require either party to enter into a contract, to agree to a proposal, or to require the making of a concession. A failure to reach an agreement on any matter of discussion shall not require the use of any part of the impasse procedure, as provided, in Sec. 13. Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of his grievances either individually or through the exclusive representative, nor shall either such obligation prevent the school employer or the superintendent from conferring with any citizen, taxpayer, student, school employee or other person considering the operation of the schools and the school corporation. • • • •

Sec. 20-7.5-1-3. Duty to bargain collectively and discuss.—On and after January 1, 1974, school employers and school employees shall have the obligation and the right to bargain collectively the items set forth in Sec. 4, the right and obligation to discuss any item set forth in Sec. 5 and shall enter into a contract embodying any of the matters on which they have bargained collectively. No contract may include provisions in conflict with (a) any right or benefit established by federal or state law, (b) school employee rights as defined in Sec. 6(a) of this chapter, or (c) school employer rights as defined in Sec. 6(b) of this chapter. It shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent.

Sec. 20-7.5-1-4. Subjects of bargaining.—A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related fringe benefits. A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitration shall have no power to amend, add to, subtract from or supplement provisions of the contract.

Sec. 20-7.5-1-5. Subjects of discussion—(a) A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters: working conditions, other than those provided in Sec. 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student

discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations: Provided, however, That any item included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable.

(b) Nothing shall prevent a superintendent or his designee from making recommendations to the school employer.

Sec. 20-7.5-1-6. Rights of school employees and school employers.—(a) School employees shall have the right to form, join or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits and other matters as defined in Secs. 4 and 5.

(b) School employers shall have the responsibility and authority to manage and direct in behalf of the public the operation and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to: (1) direct the work of its employees; (2) establish policy; (3) hire, promote, demote, transfer, assign and retain employees; (4) suspend or discharge its employees in accordance with applicable law; (5) maintain the efficiency of school operations; (6) relieve its employees from duties because of lack of work or other legitimate reason; (7) take actions necessary to carry out the mission of the public schools as provided by law.

Sec. 20-7.5-1-7. Unfair practices.—(a) It shall be an unfair practice for a school employer to:

(1) interfere with, restrain or coerce school employees in the exercise of the rights guaranteed in Sec. 6 of this chapter.

(2) dominate, interfere or assist in the formation or administration of any school employee organization or contribute financial or other support to it; provided, that subject to rules and regulations made by the governing body, a school employer may permit school employees to confer with the school employer or with any school employee organization during working hours without loss of time or pay;

(3) encourage or discourage membership in any school employee organization through discrimination in regard to hiring or tenure of employement or any term or condition of employment;

(4) discharge or otherwise discriminate against a school employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter;

(5) refuse to bargain collectively or discuss with an exclusive representative as required by any provisions of this chapter;

(6) fail or refuse to comply with any provision of this chapter.

(b) It shall be an unfair practice for a school employee organization or its agents to:

(1) interfere with, restrain or coerce (a) school employees in the exercise of the rights guaranteed by this chapter, or (b) a school employer in the selection of its representatives for the purpose of bargaining collectively, discussing or adjusting grievances. This paragraph shall not impair the right of a school employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

(2) cause or attempt to cause a school employer to discriminate against an employee in violation of subsection (a);

(3) refuse to bargain collectively with a school employer, if the school employee organization is the exclusive representative;

(4) fail or refuse to comply with any provision of this chapter.

(c) Nothing herein shall in any way restrict the right of either the school employer or the school employee organization to bring suit for specific performance and/or breach of performance of a collective bargaining contract in any court having jurisdiction thereof.

Sec. 20-7.5-1-8. Dues deduction.—The school employer shall, on receipt of the written authorization of a school employee, deduct from the pay of such employee any dues designated or certified by the appropriate officer of a school employee organization which is an exclusive representative of any employees of the school employer and shall remit such dues to such school employee organization: Provided, however, That such deductions shall be consistent with the provisions of IC 1971, 22-2-6 and IC 1971, 22-2-7, and IC 1971, 20-6-18-1.

Sec. 20-7.5-1-9. Indiana education employment relations board.—(a) There is hereby created an Indiana education employment relations board which shall consist of three members appointed by the governor to serve at his pleasure. * * *

* * * *

(e) The board shall organize its staff to provide for the functions of unit determination, unfair labor practice processing, conciliation and mediation, fact-finding and research. . . .

* * *

Sec. 20-7.5-1-10. Unit determination and selection of the exclusive representative.—(a) The exclusive representative shall serve for school employees within certain groups referred to in this chapter as units or bargaining units. No bargaining unit shall contain both cer-

tificated and non-certificated employees. Subject to this limitation, the units for which an exclusive representative shall serve shall be determined as follows:

(1) The parties may agree on the appropriate unit. For this purpose the parties shall consist of the school employer and a school employee organization representing 20 percent or more of the school employees in any proposed unit.

(2) If no such agreement is reached, or if any school employee in the proposed unit files a complaint to such unit with the board, the board shall determine the proper unit. Such determination shall be made by the board after a hearing and its decision shall be based on, but shall not be limited to, the following considerations: (i) efficient administration of school operations; (ii) the existence of a community of interest among school employees; (iii) the effects on the school corporation and school employees of fragmentation of units; and (iv) recommendations of the parties involved. In making such determination notice shall be given to all interested parties in accordance with the rules of the board, but the board need not follow the provisions of IC 1971, 4-22-1.

(b) A school employer may recognize as the exclusive representative of its employees within an appropriate unit an organization which presents to the employer evidence of its representation of a majority of the school employees within the unit, unless (1) any other organization representing 20 percent of the school employees within the unit files written objections to such recognition, or (2) any school employee files a complaint to the composition of the unit with the school employer or the board within the notice period set out below. Before recognizing such an exclusive representative under the circumstances of this subsection, the school employer shall post a written public notice of its intention to recognize the organization as exclusive representative of

the school employees within the unit. Such notice shall be posted for 30 calendar days immediately preceding recognition in each of the buildings where the school employees in any unit principally work.

(c) Where an exclusive school employee organization is not determined as provided in subsection (b) above, the determination of whether any school employee organization shall be the exclusive representative shall be determined in accordance with the following provisions:

(1) A petition may be filed by a school employee organization asserting that 20 percent of the employees in an appropriate unit (i) wish to be represented for collective bargaining by it as exclusive representative, or (ii) asserting that the designated exclusive representative is no longer the representative of the majority of school employees in the unit.

(2) A petition may be filed by the school employer asserting that one or more school employee organizations have presented to it a claim to be recognized as the exclusive representative in an appropriate unit; or that the school employer has good faith doubt that the certified school employee organization represents a majority of employees in the bargaining unit.

(3) A petition may be filed by 20 percent of the school employees in any unit asserting that the designated exclusive representative is no longer the representative of the majority of school employees in the unit.

(4) The board shall investigate such petition, and if it has reasonable cause to believe a question exists as to whether the designated exclusive representative or any school employee organization represents a majority of the school employees in a unit, it shall provide for an appropriate hearing within 30 days. In such hearing the board need not follow the requirements of IC 1971, 4-22-1. If the board finds, based upon the record of such

hearing that such a question of representation exists, it shall direct an election by secret ballot in a unit it determines to be appropriate. Certification as the exclusive representative shall then be granted only to a school employee organization that has been selected, in a secret ballot election, by a majority of all the employees in an appropriate unit as their representative. No election shall be held in any bargaining unit if a valid election has been held in the preceding 24 month period.

(d) In any election the board shall determine who is eligible to vote in the election and shall establish rules governing the election. The ballot shall contain in addition to the name of the petitioning school employee organization the names of any other school employee organizations showing written evidence satisfactory to the board of at least 20 percent representation of the school employees within the unit, and a provision for choosing "no representation by a school employee organization."

Sec. 20-7.5-1-11. Prevention of unfair practices.—Unfair practices shall be remediable in the following manner:

(a) Any school employer or any school employee who believes he is aggrieved by an unfair practice may file a complaint under oath to such effect, setting out a summary of the facts involved and specifying the section of this chapter alleged to have been violated.

(b) Thereafter, the board shall give notice to the person or organization against whom the complaint is directed and shall determine the matter raised in the complaint, and appeals may be taken in accordance with IC 1971, 4-22-1. Testimony may be taken and findings and conclusions may be made by a hearing examiner or agent of the board who may be a member thereof. The board, but not a hearing examiner or agent thereof, may enter such interlocutory orders after summary hearing as it deems necessary in carrying out the intent of this chapter.

* * * *

APPENDIX G

EXCERPTS FROM RULES AND REGULATIONS ADOPTED BY INDIANA EDUCATIONAL EMPLOYMENT RELATIONS BOARD

* * * *

Sec. 213. Periods of unchallenged representation.

Sec. 213.1. Election bar.—Where a valid election has been held in a bargaining unit in the preceding 24 months, no petition for a subsequent election may be filed until 60 days before the second anniversary of the earlier election, and no election shall be conducted until at least 24 months after a previous election.

Sec. 213.2. Recognition bar.—If Board investigation under Sec. 203.5 shows that a school employee organization has been duly recognized under procedures conforming to Sec. 10(b) of the Act within the preceding 12 months any petition filed under Sec. 203 shall be dismissed.

Sec. 213.3. Contract bar.—If investigation under Sec. 203.5 shows that there is an existing written collective bargaining agreement between the school employer and a school employee organization which is either certified or has been duly recognized under procedures conforming to Sec. 10(b) of the Act, a petition filed under Sec. 203 of these rules shall be dismissed; provided, however, such petition shall not be dismissed if:

(a) filed between January 15 and February 14 inclusive of the calendar year of the expiration or renewal date of such collective bargaining agreement.

(i) any such collective bargaining agreement having a term in excess of two years shall be treated as an agreement for a term of two years from its date of execution. This proviso is not retroactive but applies to contracts which are executed after January 1, 1974.

(ii) extensions of any such collective bargaining agreement shall not extend the period of unchallengeable representation status.

(b) provided further that such collective bargaining agreement shall not operate as a bar to a representation petition if:

(i) there is a finding that the school employer violated Sec. 7(a)(2) of the Act by dominating, interfering, or assisting in the formation or administration of the school employee organization which is party to the contract.

(ii) if such violation of Sec. 7(a)(2) is alleged in a complaint, proceedings on the petition shall be stayed until a determination of the unfair practice charge is made under proceedings provided for unfair practices. Said charge shall be given priority over other unfair practice charges.

(iii) the representation proceedings may proceed if the Board consolidates it with the unfair practice charge, and all hearings provided in Sec. 206 and 207 shall be conducted by the hearing examiner as provided for in Sec. 300 through 334.

(iv) entered into after the effective date of this amendment to these rules and regulations and such contract was executed within the 24 month period subsequent to a previous valid election.

* * * *

APPENDIX H

PIKE TOWNSHIP SCHOOLS
Decision Annual Report 1976
p. 633
BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

Case No. U-76-5350

PIKE INDEPENDENT PROFESSIONAL EDUCATORS,
Petitioner,
and
METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP,
Respondent.
and
THE PIKE CLASSROOM TEACHERS ASSOCIATION,
Intervenor.

ORDER

Having heard the oral arguments presented in the above captioned case on the 20th day of April, 1977, the Indiana Education Employment Relations Board finds:

1. The IEERB has jurisdiction of the subject matter in controversy, and the hearing examiner's first conclusion of law is thus affirmed and adopted;

2. The hearing examiner's second conclusion of law that the school corporation did not commit an unfair labor practice when, acting pursuant to contract, the corporation denied the use of a school building for meetings to a school employee organization not the exclusive representative is affirmed and adopted with the proviso that the IEERB by affirming and adopting this conclusion of law express no opinion concerning the use of school facilities for meetings held by an exclusive representative for purposes other than for the

discharge of the exclusive representative's duties of representing the bargaining unit and its individual members, and

3. The IEERB does not adopt the hearing examiner's third conclusion of law or recommended order concerning school bulletin boards for the reason that this issue was not properly before the hearing examiner. (See paragraph # 1 of IEERB Order in Brothers v. Delphi Community School Corporation, U-74-17-0755; 1974-75 Ann. Rep. at P. 399).

WHEREFORE, having found no unfair practices, the Indiana Education Employment Relations Board dismisses the complaint.

Dated this 20th day of May, 1977

INDIANA EDUCATION EMPLOYMENT
RELATIONS BOARD
Victor P. Hoehne, Chairman

[SEAL]

PIKE TOWNSHIP SCHOOLS BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

Case No. U-76-16-5350
Hearing Examiner
Robert M. Lingenfelter

PIKE INDEPENDENT PROFESSIONAL EDUCATORS,
Petitioner,
and
METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP,
Respondent.
and
THE PIKE CLASSROOM TEACHERS ASSOCIATION,
Intervenor.

HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 29, 1976, petitioner Marilyn McCormick filed a complaint before the Indiana Education Employment Relations Board (hereinafter the IEERB). In her complaint she alleged that the respondent school corporation had violated Section 7(a)(2) Public Law 217, IC 1971, Title 20, Article 7.5 by assisting in the formation and administration of one teacher organization and contributing support to this organization while discriminating against all other such organizations.

On May 24, 1976, the Pike Classroom Teachers Association brought a motion to intervene in this action. The hearing examiner granted this motion. The intervenor brought a motion to dismiss the petitioner's complaint on July 7, 1976. At the pre-trial conference the hearing examiner denied the intervenor's motion to dismiss.

The matter came up for hearing on August 24, 1976, at Indianapolis, Indiana. Upon the basis of the evidence adduced at the hearing, his evaluation of the witnesses, and his consideration of the applicable law, the hearing examiner now concludes as follows:

Findings of Fact

1. Petitioner Marilyn McCormick is a "school employee" as that term is defined by P.L. 217, § 2(e).

2. Petitioner Marilyn McCormick is employed by the Metropolitan School District of Pike Township. She is the president of the Pike Independent Professional Educators..

3. The Pike Independent Professional Educators is a school employee organization as defined by P.L. 217, § 2(k).

4. This association (hereinafter "PIPE") is not the exclusive representative of the teachers of the Metropolitan School District of Pike Township.

5. The Pike Classroom Teachers Association is a school employee organization as defined by P.L. 217, § 2(k).

6. The Pike Classroom Teachers Association is the exclusive representative of the teachers of the Metropolitan School District of Pike Township.

7. The Metropolitan School District of Pike Township is a "school employer" as that term is defined by Section 2(c) of P.L. 217.

8. PIPE is an organization of certificated employees employed by the Metropolitan School District of Pike Township.

9. PIPE, through its president, presented a written request to the school district requesting the use of a school building in order that its members could meet.

10. The school district denied PIPE's request for the reason that PIPE's use of school facilities would violate Article IV paragraph 4.65 of a contract between the school district and the Pike Township Classroom Teachers Association. This section provides that "the rights granted to the association shall not be extended to any other teacher organization."

11. The petitioner contends that the use of the above clause is an unfair labor practice by a school employer because it violates Section 7(a)(2), Public Law 217 of the Acts of 1973, IC 1976, 20-7.5-1-1 et. seq., by assisting in the formation and administration of one teacher organization and discriminating against all other such organizations.

12. PIPE, through its president, sought permission from the school district of Pike High School to allow PIPE's members the use of a school room after school hours for the "purpose of meeting to discuss its association concerns." PIPE also sought to hold "workshops" for teachers concerning the forthcoming formation of a new teacher group, the "Indiana Professional Educators."

13. Witness McCormick stated that private homes were inaccessible at the time such request was made. The local bank also refused to permit PIPE members to meet there.

14. The principal at Pike High School denied PIPE's request for the sole reason that the school corporation had contracted to grant the CTA the exclusive right to meet on school property. The respondent school corporation was deemed to have admitted this fact pursuant to Indiana Trial Rule 36. Dr. Jordan also admitted that this contractual prohibition was the sole reason for denying PIPE access to the use of the school facilities.

15. PIPE members attempted to use the school mail box facility and bulletin boards in order to distribute

responses to propaganda issued by the CTA. This attempt was prohibited by the school administration. The CTA uses the school mail boxes and bulletin boards for union activity.

16. Any organization other than those which have the character of minority unions are permitted access to the school facilities, according to witness Dr. Jordan. Such groups as the Boy Scouts, etc. are permitted to use school facilities after school hours.

17. Witness Richard Greenland was a member of the negotiating team for the CTA that negotiated the 1975-76 conrtact. He stated that three general meetings preceded the finalization of this contract. The ratification meeting was open to all teachers including PIPE members. The CTA has the obligation to represent all the teachers in the unit. In addition the CTA has held input meetings for all teachers' benefits, including non-CTA members.

Discussion

A school employer may exclude a minority union from organizational activities which take place on school property. In addition the school employer may deny the rival union nearly all organizational conveniences. Certainly a minority union may not span a bridge too far into the majority rights of the exclusive representative.

> ". . . The grant of exclusive privileges to one of two competing unions after that union has won a representation election serves a compelling interest which outweighs plaintiff's claimed right. The grant of exclusive use of a school's internal communication facilities to the intervenor provide the intervenor a ready means of communicating with all teachers. It eliminates inter-union competition for membership except at times of representation elections. More importantly, the resolution in the present case serves

> to prevent the District's schools from becoming a battlefield for inter-union squabbles." Haukvedahl v. School District No. 108, U.S. District Court for the Northern District of Illinois, Cause No. 75C 3641, (May 1976) (emphasis added).

However:

> "[T]he victorious union is the exclusive representative of all employees in the unit. Consequently, where one union is the settled exclusive representative under the Act, a rival union may be denied all organizational conveniences or advantages, except those which are essential to communicating with employees." Matter of Avondale School District Board of Education and Avondale Federation of Teachers and Avondale Education Association, Michigan Labor Mediation Board, Case No. C66 U-131, April 23, 1968 (emphasis added).

The respondent school corporation has denied access to the bulletin boards to PIPE. PIPE should have the essential tools necessary to communicate with employees. While PIPE may not hold its meetings on school property, it should be permitted to post notice of its association activities that will take place off of school premises. § 7 (a) (2) of P.L. 217 states:

> "It shall be unfair labor practice for a school employer to . . . assist in the administration of any school employee organization . . . or contribute . . . support to it, ..."

Conclusions of Law

1. The IEERB has jurisdiction to hear this complaint which alleges the commission of an unfair labor practice.

2. The respondent school corporation did not commit an unfair labor practice pursuant to P.L. 217, § 7(a) (2)

when it denied PIPE the use of a school building for meetings.

3. However, the respondent school corporation did commit an unfair labor practice pursuant to Section 7(a)(2) of P.L. 217 when it denied PIPE the use of the school bulletin boards to announce forthcoming PIPE meetings. The respondent assisted in the administration of a school employee organization by denying PIPE access to the school bulletin boards. This communication right is controlled by Section 7(a)(2).*

ORDER

The Indiana Education Employment Relations Board hereby ORDERS the Metropolitan School District of Pike Township to:

> Provide adequate and proper bulletin board space for rival teachers and teacher organizations and associations so that they might post notices of any forthcoming organization activities—so long as such activities are scheduled to take place outside of the school premises.

Entered this 22nd day of October, 1976.

---

* The school administrator may deny the rival unions the benefits and organizational advantages that the exclusive representative enjoys. However, he may not deny any teacher the essential means to communicate with fellow employees. P.L. 217, § 7(a)(2). By analogy See also Matter of *Avondale School District Board of Education and Avondale Education Association*, Michigan Labor Mediation Board, Labor Relations Division. Case No. C66 K-131 (April 23, 1968):

> "[A] rival union may [not] be denied . . . the right to essential communications."

APPENDIX I

STATE STATUTES PROVIDING FOR EXCLUSIVE RECOGNITION

Alaska:

ALASKA STAT. § 14.20.056(a)	(Teachers)
ALASKA STAT. § 23.40.100(b)	(Public Employees)

California:

CAL. GOV'T CODE § 3573 (Deering)	(Higher Education Employees)
CAL. GOV'T CODE § 3507 (Deering)	(Public Employees)
CAL. GOV'T CODE § 3520.5 (Deering)	(State Employees)
CAL. GOV'T CODE § 3544 (Deering)	(School Employees)

Connecticut:

CONN. GEN. STAT. ANN. § 5-271(b) (West)	(State Employees)
CONN. GEN. STAT. ANN. § 7-468(b) (West)	(Municipal Employees)
CONN. GEN. STAT. ANN. § 10-153(b)(e) (West)	(Teachers)

Delaware:

DEL. CODE ANN. tit. 10 § 1306	(State, County and Municipal Employees)
DEL. CODE ANN. tit. 14 § 4004	(School Employees)

District of Columbia:

D.C. CODE ANN. § 1-610.10	(Public Employees)

Florida:

FLA. STAT. ANN. § 447.307 (West)	(Public Employees)

Georgia:

GA. CODE ANN. § 54-1304	(Firefighters)

Hawaii:

HAWAII REV. STAT. § 89-8	(Public Employees)

Idaho:

IDAHO CODE § 33-1273	(Teachers)
IDAHO CODE § 44-1803	(Firefighters)

Illinois:

ILL. EXEC. ORDER No. 6 (1973) § 5	(State Employees)

Indiana:

IND. CODE § 20-7.5-1-10 (West)	(School Employees)

Iowa:

IOWA CODE ANN. §§ 20.14-20.15 (West)	(Public Employees)

Kansas:

KAN. STAT. ANN. § 72-5415	(Teachers)
KAN. STAT. ANN. § 75-4327	(Public Employees)

Kentucky:

KY. REV. STAT. ANN. § 345.030 (Baldwin)	(Firefighters)

Louisiana:

LA. REV. STAT. ANN. § 23:890D (West)	(Transit Employees)

Maine:

ME. REV. STAT. ANN. tit. 26 § 967	(Public Employees Except State Employees)
ME. REV. STAT. ANN. tit. 26 § 979-F	(State Employees)
ME. REV. STAT. ANN. tit. 26 § 1025	(University of Maine Employees)

Maryland:	
MD. EDUC. CODE ANN. § 6-407	(School Employees)
BALTIMORE CITY CODE ART. I § 115	(Municipal Employees In Baltimore)
Massachusetts:	
MASS. ANN. LAWS CHAP. 150E § 4 (Michie/Law Co-op)	(Public Employees)
Michigan:	
MICH. STAT. ANN. § 17.455 (11)	(Public Employees)
Minnesota:	
MINN. STAT. ANN. § 179.65 (West)	(Public Employees)
Missouri:	
MO. ANN. STAT. § 105.510 and § 105.520 (Vernon)	(Public Employees Except Police, Deputy Sheriffs, Mo. State Highway Patrol, Mo. State Highway Patrol, Mo. National Guard, Teachers of all Mo. Schools, Colleges and Universities)
Montana:	
MONT. CODE ANN. § 39-31-208	(Public Employees)
MONT. CODE ANN. § 39-32-107	(Nurses)
Nevada:	
NEV. REV. STAT. § 288.160	(Municipal Employees)
New Hampshire:	
N.H. REV. STAT. ANN. § 273-A:10	(State Employees)

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New Jersey:	
N.J. REV. STAT. ANN. § 34:13A-5.3 (West)	(Public Employees)
North Dakota:	
N.D. CENT. CODE § 15-38.1-11	(Teachers)
Oklahoma:	
OKLA. STAT. ANN. tit. 11 § 51-103 (West)	(Firefighters and Police)
OKLA. STAT. ANN. tit. 70 § 509.2 (West)	(School Employees)
Oregon:	
OR. REV. STAT. § 243.666	(Public Employees)
Pennsylvania:	
PA. STAT. ANN. tit. 43 § 1101.606 (Purdon)	(Public Employees Except Firemen and Police)
Rhode Island:	
R.I. GEN. LAWS § 36-11-1	(State Employees)
R.I. GEN. LAWS § 28-9.4-4	(Municipal Employees)
R.I. GEN. LAWS § 28-9.3-3	(School Teachers)
R.I. GEN. LAWS § 28-9.1-5	(Firefighters)
R.I. GEN. LAWS § 28-9.2-5	(Municipal Police)
R.I. GEN. LAWS § 28-9.5-5	(State Police)
South Dakota:	
S.D. CODIFIED LAWS ANN. § 3-18-3	(Public Employees)
Texas:	
TEX. CIVIL STAT. LABOR § 5154c-1 (Vernon)	(Fire and Police Employees)

Tennessee:

TENN. CODE ANN. § 49-5504 (Local Board of Education Employees)

Utah:

UTAH CODE ANN. § 34-20a-4 (Firefighters)

Vermont:

VT. STAT. ANN. tit. 21 § 1583 (State Employees)
VT. STAT. ANN. tit. 21 §§ 1723 & 1724 (Municipal Employees)
VT. STAT. ANN. tit. 16 § 1991 (Teachers)

Washington:

WASH. REV. CODE ANN. § 41.56.080 (Public Employees)
WASH. REV. CODE ANN. § 41.59.090 (Education Employees)
WASH. REV. CODE ANN. § 28B.100(11) (Higher Education Employees)
WASH. REV. CODE ANN. § 28B.52.030 (Academic Employees)

Wisconsin:

WIS. STAT. ANN. § 111.83 (West) (State Employees)
WIS. STAT. ANN. § 111.70 (Municipal Employees)

Wyoming:

WYO. STAT. § 27-10-104 (Firefighters)

Joint Appendix

Office - Supreme Court, U.S.
FILED
MAR 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION,
Appellant

v.

PERRY LOCAL EDUCATORS' ASSOCIATION, *et al.*,
Appellees

JOINT APPENDIX

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APPEAL DOCKETED NOVEMBER 12, 1981
JURISDICTION POSTPONED JANUARY 11, 1982

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RELEVANT DOCKET ENTRIES

3/3/79 Complaint filed. Summons issued. Cover sheet filed.

4/16/79 Answer of Perry Education Association; c/s.

4/16/79 Answer of defendants, William Hohlt, Robert Bush, Thomas Coahran, James Stainbrook, Jr. and Richard A. Poppa; c/s.

4/30/79 Defendants, Williiam Hohlt, Robert Bush, Thomas Coahran, James Stainbrook Jr. and Richard A. Poppa file Request for Admissions; c/s.

7/26/79 Defendants file pleadings:

1) Motion for Summary Judgment, c/s
2) Memorandum in support of defendants Motion for Summary Judgment, c/s.; Affidavit of Jerry S. Moore.

7/27/79 Defendant, Perry Education files pleadings:

1) Motion for Summary Judgment, c/s
2) Memorandum in support of Defendants' Motion for Summary Judgment, c/s.

9/11/79 Court grants the plaintiffs' motion for leave to response to the defendants motion for Summary Judgment. (S.E.) Plaintiffs' file motion in opposition to defendants' motion for Summary Judgment or in the Alternative, Plaintiff's Cross Motion for Summary Judgment, with Memorandum in Support thereto. Plaintiffs file statement of Genuine Issues, c/s. Plaintiffs file affidavits of Judith M. Dietrich, Evelyn E. Waddell and Frank Knigga.

2/25/80 This matter having come before the Court upon cross motions for summary judgment and the Court having examined said motions does hereby Enter JUDGMENT in favor of the defendants and against the plaintiffs.

Court files Memorandum Entry. (S.E.)

CASE CLOSED.

3/24/80 Plaintiffs file notice of appeal to the United States Court of Appeal for the Seventh Circuit from the final judgment granting summary judgment in favor of all defendants and against all plaintiffs entered in this cause on February 25, 1980. Copy of the notice of appeal sent to the attorneys of record and to the court reporter. Copy of the notice of appeal, information sheet and docket entries mailed to the court of appeals. Fees paid.

9/18/81 Certified copy of opinion and mandate received and filed this date. District Court Reversed and case is Remanded for proceedings in conformity with the opinion. Order Denying en banc filed and costs in the sum of $343.61 taxed in favor of the plaintiff-appellant.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION

and

EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, THOMAS COAHRAN, JAMES STAINBROOK, JR., and RICHARD A. POPPA, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana

and

PERRY EDUCATION ASSOCIATION,
Defendants.

COMPLAINT

I.

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(3) and (4). This is a suit for damages and equitable relief authorized by 42 U.S.C. § 1983 to be commenced by any citizen of the United States, or person within the jurisdiction thereof, to redress the deprivation under color of any state law, statute, ordinance, regulation, usage or practice of those rights, privileges and immunities secured by the Constitution of the United States. The rights, privileges and immunities sought herein to be redressed and those secured by the First and Fourteenth Amendments, United States Constitution.

The pendent jurisdiction of this Court is also invoked to the extent that state issues are involved within the common nucleus of operative facts which give rise to the federal questions presented.

2. This is also a proceeding for declaratory judgment pursuant to 28 U.S.C. § 2201 of the rights established by the aforementioned constitutional provisions.

II.

Parties

3. Plaintiff Perry Local Educators' Association (hereinafter referred to as "PLEA") is an unincorporated association open to all licensed educators employed in the Metropolitan School District of Perry Township, Marion County, Indiana, who support the goals and philosophy of the Association.

4. Plaintiffs Evelyn E. Waddell and Judith M. Dietrich are each adult citizens of the United States who reside in the Southern District of Indiana, Indianapolis Division and who are members of PLEA.

5. Defendants William Hohlt, Robert Bush, Thomas Coahran, James Stainbrook, Jr., and Richard A. Poppa are all, upon information and belief, adult citizens of the United States who reside in Perry Township, Marion County, Indiana. Said defendants comprise the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana, (hereinafter "Board") which Board is charged with the responsibility and authority for administering and managing in behalf of the public the operations and activities of said public school corporation which includes, but is not necessarily limited to, those matters set forth at IC 20-7.5-1-6, provided, however, that such administration and management is not otherwise in violation of law.

6. Defendant Perry Education Association (hereinafter referred to as "PEA") is, upon information and

belief, the recognized exclusive bargaining agent/representative of and for all full-time certificated school employees under a valid Regular or Temporary Teacher's Contract of the Metropolitan School District of Perry Township, Marion County, Indiana, excluding the Superintendent and specified others, with respect to such matters as are legitimate subjects of bargaining as provided in IC 20-7.5-1-4.

III.

Count I

7. Plaintiff Waddell has been employed as a public school teacher by the defendant Board for approximately fourteen (14) years and currently teaches first grade at MacArthur Elementary School. She has been a member of PLEA since approximately 1974.

8. Plaintiff Dietrich has been employed as a public school teacher by the defendant Board for approximately four and one-half (4½) years and currently teaches Spanish at Meridian Middle School. She has been a member of PLEA since approximately 1975.

9. As hereinbefore generally described, PLEA is an unincorporated association founded in 1973 the membership of which is open to all licensed educators employed by the defendant Board who subscribe to and concur with the association's basic objectives which include, inter alia, discouraging interruption of education due to strikes and other work stoppages and ensuring to all educators a freedom of choice in affiliation in professional organizations. PLEA has members in all thirteen (13) schools in the Metropolitan School District of Perry Township.

10. On a date which is at this time unknown, defendant PEA became recognized by the defendant Board as the bargaining agent/representative of and for all full-time certificated school employees under a Valid/Regular or Temporary Teacher's Contract of the Metropolitan School District of Perry Township, excluding the Super-

intendent and specified others, (hereinafter the "bargaining unit") through, upon information and belief, default and/or election.

11. On or about September 25, 1978, defendant PEA and defendant Board entered into and executed a certain Agreement, a copy of which is attached hereto, made a part hereof and marked Exhibit A, which, in essence, is a collective bargaining agreement pertaining to the respective rights, duties and obligations of all school employees included in the bargaining unit and the defendant Board.

12. Said Agreement is, upon information and belief, the result and product of a series of negotiations between defendant PEA and defendant Board.

13. None of the herein plaintiffs were, however, present or represented at the times or places the Agreement was negotiated, discussed, bargained or executed.

14. By the terms and provisions of said Agreement, the defendants have for the first time contracted away, denied and deprived to plaintiffs in their absence rights which they separately and severally had enjoyed prior to the execution of said Agreement and in which they separately and severally have an interest protected and guaranteed by the First Amendment, United States Constitution.

15. By the terms and provisions of the said Agreement, the defendant PEA and the defendant Board have contracted away, denied and deprived the plaintiffs rights to use the inter-school mail system which prior to the execution of said Agreement plaintiffs had been able to use. The use of said inter-school mail system has pursuant to Article II, § 2D of said Agreement become the exclusive province of the defendant PEA.

16. By the terms and provisions of the said Agreement, the defendant PEA and defendant Board have

contracted away, denied and deprived the plaintiffs' right to use of the teacher's mailboxes which prior to the execution of said Agreement plaintiffs had been able to use. The use of said teacher's mailboxes has pursuant to Article II, § 2C of said Agreement become the exclusive province of defendant PEA.

17. Without being able to use the inter-school mail system and teacher's mail boxes, the plaintiffs are effectively foreclosed from communicating with other members and professional associates with whom they had prior to the execution of said Agreement been able to communicate and associate.

18. The aforementioned exclusive rights provisions in said Agreement by which the plaintiffs are forebade and prohibited from using the inter-school mail system and the teacher's mailboxes, which terms and provisions of said Agreement were contracted for by the defendants in concert and in the absence of the plaintiffs, violate and contravene the plaintiffs' rights to freedom of association and speech as guaranteed to them by the First Amendment, United States Constitution.

19. The aforementioned exclusive rights provision in said Agreement by which the plaintiffs herein are forbade and prohibited from using the inter-school mail system and the teacher's mailboxes, which terms and provisions were agreed-upon by the defendants in concert and in the absence of the plaintiffs, were calculated by the defendants to and have caused to plaintiffs irreparable damage.

Count II

20. Plaintiffs hereby incorporated by reference rhetorical paragraphs 1-19 above as fully set forth herein.

21. The aforementioned exclusive rights provisions in said Agreement by which the plaintiffs are forbade and prohibited from using the inter-school mail system and the teacher's mailboxes while granting these same rights to defendant PEA, which terms and provisions of said

Agreement were contracted for by the defendants in concert and in the absence of the plaintiffs, violate and contravene the plaintiffs' rights to equal protection of the laws as guaranteed to them by the Fourteenth Amendment, United States Constitution.

22. The aforementioned exclusive rights provision in said Agreement by which the plaintiffs are forbade and prohibited from using the inter-school mail system and the teacher's mailboxes while granting these same rights to defendant PEA, which terms and provisions of said Agreement were contracted for by the defendants in concert and in the absence of the plaintiffs, suffer the plaintiffs disparate treatment under the law against which the Fourteenth Amendment, United States Constitution, guarantees.

Count III

23. Plaintiffs hereby incorporate by reference rhetorical paragraphs 1-19 and 21-22 above as if fully set forth herein.

24. The acts of defendant PEA and defendant Board in contracting away, denying and depriving to plaintiffs in their absence rights which they had enjoyed prior to the execution of the said Agreement violate and contravene the intent and the letter of state law, to wit: IC 20-7.5-1-1(d), in which the constitutional requirements of the relationship between school corporations such as the defendant Board herein and school employees such as the plaintiffs herein in the public sector are recognized as differing from similar relationships between employers and employees which may exist in the private sector.

IV.

Relief

WHEREFORE, the plaintiffs and each of them, request the Court to:

1. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201:

a. That the exclusive rights provisions in the aforementioned Agreement as described above violate and contravene plaintiffs rights' to speech and association guaranteed by the First Amendment, United States Constitution;

b. That the exclusive rights provisions in the aforementioned Agreement as described above violate and contravene plaintiffs' rights pursuant to the Equal Protection Clause of the Fourteenth Amendment, United States Constitution.

c. That the exclusive rights provisions in the aforementioned Agreement as described above violate and contravene plaintiffs' rights to having and exercising constitutional rights as generally provided by IC 20-7.5-1-1(d).

2. Enter a permanent injunction prohibiting and restricting the defendants, their employees, servants, successors-in-office, and all others in the active concert and participation with them from enforcing, implementing, or effecting said exclusive rights.

3. Grant to each plaintiff the sum of one thousand (1000) dollars as compensatory damages.

4. Grant to plaintiffs their attorneys' fees in this action pursuant to 42 U.S.C. § 1988 and costs of this action including any bonds or other undertakings pursuant to 28 U.S.C. § 1920.

5. Grant such other relief as this Court deems just and proper.

/s/ Richard D. Boyle
RICHARD D. BOYLE

/s/ Lawrence M. Reuben
LAWRENCE M. REUBEN
Attorneys for Plaintiffs

BOYLE ATLAS HYATT & REUBEN
1444 Consolidated Building
Indianapolis, Indiana 46204
(317) 634-2200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION

and

EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, THOMAS COAHRAN, JAMES STAINBROOK, JR., and RICHARD A. POPPA, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana

and

PERRY EDUCATION ASSOCIATION,
Defendants.

ANSWER OF PERRY EDUCATION ASSOCIATION

Comes now the Perry Education Association, by counsel, and for its answer to Plaintiffs' Complaint alleges and says that:

1. It admits the allegations of rhetorical paragraph 1 of the Complaint.

2. It admits the allegations of rhetorical paragraph 2 of the Complaint.

3. It is without sufficient knowledge or information to admit or deny the allegations of rhetorical paragraph 3 of the Complaint.

4. It is without sufficient knowledge or information to admit or deny the allegations of rhetorical paragraph 4 of the Complaint.

5. It admits the allegations of rhetorical paragraph 5 of the Complaint.

6. It admits the allegations of rhetorical paragraph 6 of the Complaint, except it alleges that it was not recognized as the exclusive bargaining agent for teachers on Temporary Teachers' Contracts until July, 1978.

7. It is without sufficient knowledge or information to admit or deny the allegations of rhetorical paragraph 7 of the Complaint.

8. It is without sufficient knowledge or information to admit or deny the allegations of rhetorical paragraph 8 of the Complaint.

9. It is without sufficient knowledge or information to admit or deny the allegations of rhetorical paragraph 9 of the Complaint. However, it alleges that there are sixteen (16) schools in the Metropolitan School District of Perry Township, not thirteen (13) as alleged in the Complaint.

10. It admits the allegations of rhetorical paragraph 10 of the Complaint and alleges that it was recognized as bargaining agent following an election, and not by default. It was not recognized as the bargaining agent for teachers on Temporary Teachers' Contracts until July, 1978.

11. It admits the allegations of rhetorical paragraph 11 of the Complaint, but further alleges that the effective date of the Agreement was July 25, 1978.

12. It admits the allegations of rhetorical paragraph 12 of the Complaint.

13. It denies the allegations of rhetorical paragraph 13 of the Complaint.

14. It denies the allegations of rhetorical paragraph 14 of the Complaint.

15. It denies the allegations of rhetorical paragraph 15 of the Complaint.

16. It denies the allegations of rhetorical paragraph 16 of the Complaint.

17. It denies the allegations of rhetorical paragraph 17 of the Complaint.

18. It denies the allegations of rhetorical paragraph 18 of the Complaint.

19. It denies the allegations of rhetorical paragraph 19 of the Complaint.

20. Such Defendant incorporates by reference its answers to rhetorical paragraphs 1-19 above as though fully set forth herein.

21. It denies the allegations of rhetorical paragraph 21 of the Complaint.

22. It denies the allegations of rhetorical paragraph 22 of the Complaint.

23. Such Defendant incorporates by reference its answers to rhetorical paragraphs 1-19 and 21-22 above as though fully set forth herein.

24. It denies the allegations of rhetorical paragraph 24 of the Complaint.

WHEREFORE, Defendant Perry Education Association respectfully prays that Plaintiffs take nothing by their Complaint, and that judgment be entered in favor of Defendants, together with attorneys' fees on behalf of Defendants.

/s/ Richard J. Darko
RICHARD J. DARKO
Attorney for
Perry Education Assn.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION

and

EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, THOMAS COAHRAN, JAMES STAINBROOK, JR., and RICHARD A. POPPA, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana

and

PERRY EDUCATION ASSOCIATION,
Defendants.

ANSWER

I.

Come now the Defendants, William Hohlt, Robert Bush, Thomas Coahran, James Stainbrook, Jr., and Richard A. Poppa, by counsel, and by way of answer to legal paragraphs I, II and III of Plaintiffs' Complaint, allege and say the following:

1. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in rhetorical paragraphs 1, 2, 3, and 4 of Plaintiffs' Complaint.

2. Defendants admit the allegations contained in rhetorical paragraphs 5 and 6 of Plaintiffs' Complaint.

3. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in rhetorical paragraphs 7, 8, 9, and 11 of Count I of legal paragraph III of Plaintiffs' Complaint.

4. Defendants admit the allegations contained in rhetorical paragraphs 10 and 12 of Count I of legal paragraph III of Plaintiffs' Complaint.

5. Defendants deny the allegations contained in rhetorical paragraphs 13, 14, 15, 16, 17, 18, and 19 of Count I of legal paragraph III of Plaintiffs' Complaint.

6. In answer to rhetorical paragraph 20 in Count II of legal paragraph III of Plaintiffs' Complaint, Defendants hereby incorporate by reference the above answers to rhetorical paragraphs 1 through 19 of Plaintiffs' Complaint.

7. Defendants deny the allegations contained in rhetorical paragraphs 21 and 22 in Count II of legal paragraph III of Plaintiffs' Complaint.

8. In answer to rhetorical paragraph 23 in Count III of Plaintiffs' Complaint Defendants hereby incorporate by reference the above answers to rhetorical paragraphs 1 through 19, 21 and 22 of Plaintiff's Complaint.

9. Defendants deny the allegations contained in rhetorical paragraph 24 of Count III of legal paragraph III of Plaintiffs' Complaint.

WHEREFORE, Defendants pray that Plaintiffs take nothing by way of their complaint, that judgment be entered for the above named defendants, with costs, and for all other just and proper relief.

GOOD & BERTRAM

By: /s/ Ray Good
RAYMOND GOOD
Attorney for Defendants,
William Hohlt,
Robert Bush,
Thomas Coahran,
James Stainbrook, Jr.
and Richard A. Poppa

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION, *et al.*,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, *et al.*,
Defendants.

RESPONSE TO REQUEST FOR ADMISSIONS

Plaintiffs Perry Local Educators' Association, Evelyn E. Waddell and Judith M. Dietrich, by counsel, hereby respond to defendants' William Hohlt, Robert Bush, Thomas Coahran, James Stainbrook, Jr., and Richard A. Poppa Request For Admissions as follows:

1. Each school has a set of mailboxes or slots located within the building.

Answer: Admit.

2. Within those mailboxes each teacher has an individual box or slot with his or her name on it.

Answer: Admit.

3. These mailboxes are used privately only, that is, they are not used in any way for the distribution of public mails by the United States Postal Service.

Answer: Deny; United States mail is delivered to the school and internally distributed to the individual addresses by a clerk on a routine basis.

4. Both before and after the inclusion of the present contract term which grants to Defendants, Perry Education Association (hereinafter referred to as "PEA") the exclusive right as an employee representative to use the

mailboxes, anyone distributing materials through such mailboxes was required to make a copy of the material available to the building principal in advance of distribution.

Answer: This was only true for groups such as PTA or Teacher's Associations. It was not true for individuals.

5. Perry Local Educators' Association (hereinafter referred to as "PLEA") has not been further restricted by the present contract terms with PEA as to its use of the bulletin boards located in the school buildings.

Answer: Objection on the ground that the use of "further" is unclear. Counsel is not sure what the term relates to.

6. PLEA has the right to have the use of reasonable bulletin Board space in each school building.

Answer: Yes in theory but not in practice. Burkhart Elementary has reasonable board space but other schools in the township do not so the bulletin board availability and access is not reasonable system-wide.

7. The present contract terms within PEA have made no further restrictions on PLEA as to its use of the intercom system in any particular school.

Answer: Admit.

8. PLEA may use a particular school intercom system with the prior approval of the building principal.

Answer: Admit. Neither association is supposed to use the intercom during the school day except with the special permission of the building principal.

9. The use of the intercom system is presently subject to the prior approval of the building principal, both as to PLEA and PEA.

Answer: Admit.

10. Every teacher has a copy of a booklet containing the names and addresses of all teachers within the Perry Township School System.

Answer: Admit. At least every teacher is supposed to have such a booklet.

11. PLEA has access to the names and addresses of every teacher in the Perry Township School System.

Answer: It is eventually true each school year; however, it is not true until after November when the lists are published. By then it is too late to conduct membership drives with new teachers. PLEA asked for this information in August 1978 when it would have been useful but it was not provided until the Directory was published in November, 1978.

12. PLEA has the ability to communicate at any time with any or all teachers within the Perry Township School System by means of the United States Mail System.

Answer: Yes, but we have no access to the names and addresses of new teachers early in the school year when membership drives are conducted.

13. The inter-school mail system carries school related communications between the various buildings within the Perry Township School System.

Answer: Admit.

14. The inter-school mail system utilizes the mail boxes located in each school for the distribution of the inter-school communications.

Answer: Admit.

15. The inter-school mail system operates only between the various buildings within the Perry Township School System.

Answer: Deny; it also serves the parochial schools within Perry Township which are not a part of the township school system.

16. The inter-school mail system is not a public communication system, but carries only school related communications.

Answer: Deny; the system carries all kinds of non-school related communications such as Christmas cards, personal messages between individuals, etc. In addition, we object on the basis that only the court is competent to make a legal conclusion as to what constitutes a "public communication system."

17. No provision in the current contract between the Perry Township Board of Education and the PEA restricts in any way PLEA's ability to discuss union-related matters with teachers before and after school.

Answer: Deny. In addition, PLEA does not consider itself a "union."

18. No provision of the current contract between the Perry Township Board of Education and the PEA restricts PLEA's ability to discuss union-related matters with teachers during mutual free periods at school.

Answer: Objection because of the ambiguity of the defendants' use of the term "mutual free periods."

19. No provision of the current contract between the Perry Township Board of Education and the PEA restricts the PLEA's ability to discuss union-related matters with teachers at lunch.

Answer: Admit. Qualified admission to the extent that there is no restriction to casual, informal spur of the moment meetings over the lunch hour since such meetings would arguably require no prior notification or organization.

20. No provision of the current contract between the Perry Township Board of Education and the PEA restricts the PLEA's ability to distribute union-related

materials to teachers in the teachers' lounge in any particular school.

Answer: Admit. *But see* answer to # 9.

21. No provision of the current contract between the Perry Township Board of Education and the PEA restricts the PLEA's ability to distribute union-related materials to teachers in the hallways of any particular school.

Answer: Both PLEA and PEA are restricted alike by school policy (directive) from doing this.

22. No provision of the current contract between the Perry Township Board of Education and the PEA restricts the PLEA's ability to distribute union-related materials to teachers in their classrooms when this does not interfere with the performance of their teaching duties.

Answer: See answer to request number 21 above.

23. Nothing in the current agreement between the Perry Township Board of Education and the PEA in any way restricts PLEA's ability to telephone any teacher at home to discuss union-related matters.

Answer: Admit.

24. PLEA is in no way restricted in its abilities to call or hold meetings of teachers off campus.

Answer: Admit.

25. Nothing in the present contract between the Board of Education of Perry Township and the PEA in any way further restricts PLEA's ability to hold meetings on school property.

Answer: Objection on the ground that the question is unclear in the use of "further". The question arises: "further than what?"

26. PEA is presently certified under Indiana Law as the exclusive bargaining representative of all teachers in the Perry Township School District.

Answer: Admit.

27. No challenge to the majority representative status of PEA has been made in 1979 by the PLEA.

Answer: Admit.

28. PLEA challenged the majority representative status of the PEA in 1977.

Answer: Admit.

29. Because of that challenge an election was held by the Indiana Employment Relations Board, (hereinafter referred to as the "IEERB"), to determine what organization represented a majority of the teachers in the appropriate unit within the Perry Township School District.

Answer: Admit.

30. Pursuant to the IEERB's authority under IC 20-7.5-1-10(d), it established "Election Ground Rules for Determining the Exclusive Bargaining Agent for the Metropolitan School District of Perry Township".

Answer: Admit.

31. Within said rules as proposed by the IEERB the following rules, among others, were set forth:

> "Both organizations (PLEA and PEA) shall be allowed access to the schools for the purpose of campaigning." "Neither organization shall use any interschool mail system or school mailbox for the purpose of campaigning." "Material may be distributed from the teachers' lounge at any time."

Answer: Admit.

32. In addition, for the election held in 1977, the following campaign ground rules were agreed to sepa-

rately by representatives of PEA, PLEA, and the School Board:

"1. Both organizations shall be allowed access to the schools for the purpose of campaigning."

"2. Neither organization shall use any inter-school mail system or school mailbox for the purpose of campaigning. Material may be distributed from the teachers' lounge in each building at any time."

"3. Both organizations shall refrain from involving students in any way in the campaign."

"4. The school board, administrators, and all employees not in the voting unit shall refrain from interfering with the rights of both organizations."

"5. All campaigning in the schools shall cease at the close of school on February 22, 1977."

Answer: Admit.

Respectfully submitted,

/s/ Richard D. Boyle
RICHARD D. BOYLE
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION

and

EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, THOMAS COAHRAN, JAMES STAINBROOK, JR., and RICHARD A. POPPA, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana

and

PERRY EDUCATION ASSOCIATION,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendants, William Hohlt, Robert Bush, Thomas Coahran, James Stainbrook, Jr., and Richard Poppa, by counsel, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, and move the Court for Summary Judgment against the plaintiffs and for the aforementioned defendants, and in support of which files the attached Affidavit of Gerald Moore, agent for the above-mentioned defendants and files its Memorandum in Support of this Motion.

WHEREFORE, Defendants, William Hohlt, Robert Bush, Thomas Coahran, James Stainbrook, Jr., and Richard Poppa move the Court for Summary Judgment against Plaintiffs, Perry Local Educators' Association, Evelyn

Waddell and Judith M. Dietrich and for any and all other proper relief.

Respectfully submitted,

GOOD & BERTRAM

By: /s/ Ray Good
RAYMOND GOOD
Attorney for Defendants,
William Hohlt,
Robert Bush,
Thomas Coahran,
James Stainbrook, Jr.
and Richard Poppa

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION

and

EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, THOMAS COAHRAN, JAMES STAINBROOK, JR., and RICHARD A. POPPA, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana

and

PERRY EDUCATION ASSOCIATION,
Defendants.

AFFIDAVIT

Comes now Jerry S. Moore, being duly sworn upon his oath, and says:

1. That I am Jerry S. Moore and I am employed by the Metropolitan School District of Perry Township in the capacity of Director of Business Services.

2. That, on or about March 1, 1977, the teachers employed by the Metropolitan School District of Perry Township had a labor representative election. During the campaign, neither party could use the mailboxes and interschool mail system. There have been no subsequent representative elections and PEA is still the recognized bargaining agent for the Professional employees (teachers).

3. That on or about September 25, 1978, the Metropolitan School District of Perry Township and Perry Education Association (PEA) entered into a collective bargaining agreement including clauses granting PEA exclusive use of the teachers mailboxes and the interschool mail system among professional employee labor organizations.

4. That, notwithstanding No. 3 above, the policy of the Metropolitan School District of Perry Township concerning any use of the mailboxes and mail system by a school-related or non-school-related organization is to obtain prior approval of the individual buildings principal before such use. The School District retains exclusive control over the use of the mailboxes and mail system by other organizations.

5. That both Perry Local Educators' Association (PLEA) and PEA can obtain similar access to school bulletin boards, teachers lounges, school intercoms (before and after school), school meeting rooms, and names and addresses of the professional employees (teachers) for distribution of organization information.

6. Further Affiant saith not.

/s/ Jerry S. Moore
JERRY S. MOORE

Raymond Good
GOOD & BERTRAM
Attorneys for Defendants,
William Hohlt, Robert Bush,
Thomas Coahran, James Stainbrook, Jr.,
and Richard A. Poppa
5972 Madison Avenue
Indianapolis, Indiana 46227
(317) 783-1321

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION
EVELYN E. WADDELL and JUDITH M. DIETRICH,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, THOMAS COAHRAN, JAMES STAINBROOK, JR., and RICHARD A. POPPA, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana

PERRY EDUCATION ASSOCIATION,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant, Perry Education Association, by counsel, and moves the Court for Summary Judgment against the Plaintiffs and for the aforementioned Defendant, and in support relies upon the Affidavit of Gerald Moore, filed by Co-Defendants herein, and upon the response to Request for Admissions of Plaintiffs Perry Local Educators Association, and files its Memorandum in Support of this Motion.

WHEREFORE, Defendant Perry Education Association moves the Court for summary judgment against Plaintiffs, on the ground that there is no genuine issue of material fact, and for any and all other proper relief.

Respectfully submitted,

/s/ Richard J. Darko
RICHARD J. DARKO
Attorney for Defendant
Perry Education Association

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION, *et al.*,
Plaintiffs,

v.

WILLIAM HOHLT, ROBERT BUSH, *et al.*,
Defendants.

PLAINTIFFS' MOTION IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by counsel, in opposition to defendants' motions for summary judgment, hereby move this Court to deny defendants' motions for summary judgment on the grounds that genuine issues of material fact exist in this cause which cannot be resolved on summary judgment.

In the alternative and in the event that the genuine issues as presented by plaintiffs are determined by the Court to not be such as to preclude summary judgment, plaintiffs move this Court to grant to them and against the defendants summary judgment pursuant to F.R.C.P. 56.

In support hereof, plaintiffs incorporate their Statement of Genuine Issues, Memorandum In Support Of Plaintiffs' Motion In Opposition To Defendants' Motions For Summary Judgment Or, In The Alternative, Plaintiffs' Cross-Motion For Summary Judgment, the Affidavits filed herewith, as well as the entirety of the record herein.

WHEREFORE, plaintiffs, by counsel, pray that this Court will either deny the defendants' motions for sum-

mary judgment, and proceed to adjudicate this cause on the merits or, in the alternative, will grant to plaintiffs summary judgment and all other appropriate relief.

/s/ Lawrence M. Reuben
LAWRENCE M. REUBEN
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION, *et al.*,
Plaintiffs,

v.

WILLIAM HOHLT, *et al.*,
Defendants.

AFFIDAVIT OF JUDITH M. DIETRICH

STATE OF INDIANA)
) ss:
COUNTY OF MARION)

I, Judith M. Dietrich, being duly sworn, depose and say:

1. I am a named plaintiff herein, am an adult citizen of the United States and I reside in the Southern District of Indiana, Indianapolis Division.

2. I have been employed as a public school teacher by the defendant Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana, (hereinafter "Board") for approximately four and one half (4½) years, most recently teaching Spanish at Meridian Middle School.

3. I have been a member of the Perry Local Educators' Association (hereinafter "PLEA") since approximately 1975.

4. PLEA is an unincorporated association founded in 1973, the membership of which is open to all licensed educators employed by the Board who subscribe to and concur with the association's basic objectives which include,

inter alia, the avoidance of union related labor strife, the discouraging of interruption of education due to strikes and other illegal work stoppages and the ensuring to all educators of freedom of choice in affiliation with professional educator organizations.

5. PLEA has educator members in all thirteen (13) schools in the Metropolitan School District of Perry Township.

6. On or about July 25, 1978, defendant Perry Education Association (hereinafter "PEA") became recognized by the defendant Board as the bargaining representative of and for all full-time certificated school employees under a valid Regular or Temporary Teacher's Contract of the Metropolitan School District of Perry Township, excluding the superintendent and specified others.

7. On or about July 25, 1978, defendant PEA and defendant Board entered into an "Agreement" which is, in effect, a collective bargaining agreement pertaining to the respective rights, duties and obligations of all school employees included in the bargaining unit and the defendant Board.

8. The Agreement was a result and product of a series of negotiations between defendant PEA and defendant Board.

9. No member or representative of PLEA was present at the times or places that such Agreement was negotiated, discussed or bargained.

10. As a result of the terms of such Agreement defendants PEA and Board have attempted to contract away, for the first time, rights which plaintiffs, jointly and separately, had enjoyed prior to the effective date of such Agreement and which rights are protected by the First Amendment of the United States Constitution.

11. By the terms of such Agreement, defendants PEA and the Board have contracted away the plaintiffs' right

to use the inter-school mail system which, prior to the execution of the Agreement between PEA and the Board, plaintiffs had been able to use.

12. By the terms of the Agreement, the use of the inter-school mail system, pursuant to Article II § 2D, became the exclusive province of the defendant PEA.

13. By the terms of the Agreement, the use of the teachers' mailboxes, pursuant to Article II § 2C, became the exclusive province of the defendant PEA.

14. Prior to the effective date of said Agreement, plaintiffs had been able to use the teachers' mailboxes but such right was contracted away by PEA and the Board.

15. The granting of the exclusive right to use the inter-school mail system and the teachers' mailboxes has effectively foreclosed to plaintiffs the effective communication with other members and professional associates with whom they had been able to communicate and associate prior to the execution of said Agreement.

16. Since PLEA was formed as an unincorporated association approximately six (6) years ago, there have been no incidents of "labor strife" or "labor disharmony" either between PEA and PLEA or between PLEA and the Board.

17. Members of PLEA neither perceive themselves to be or hold themselves out as members of a "union" or "labor organization", minority or otherwise, but rather as an unincorporated association of professional educators with common interests, concerns and needs to communicate and associate with each other and with other professional educators.

18. The inter-school mail system in Perry Township has traditionally been used as a public or quasi-public medium of communication of various kinds, including, but not limited to, church groups, cub scouts, YMCA's and

YWCA's, Parochial Schools in Perry Township and the private or quasi-private medium of a variety of personal communication (*e.g.* Christmas cards, etc.) which have nothing to do with official school or educational communications.

/s/ Judith M. Dietrich
JUDITH M. DIETRICH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION, *et al.*,
Plaintiffs,

v.

WILLIAM HOHLT, *et al.*,
Defendants.

AFFIDAVIT OF EVELYN E. WADDELL

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

I, Evelyn E. Waddell, being duly sworn, depose and say:

1. I am a named plaintiff herein, am an adult citizen of the United States and I reside in the Southern District of Indiana, Indianapolis Division.

2. I have been employed as a public school teacher by the defendant Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana, (hereinafter "Board") for approximately fourteen (14) years, most recently teaching first grade at MacArthur Elementary School.

3. I have been a member of the Perry Local Educators' Association (hereinafter "PLEA") since approximately 1974.

4. PLEA is an unincorporated association founded in 1973, the membership of which is open to all licensed educators employed by the Board who subscribe to and concur with the association's basic objectives which include, inter alia, the avoidance of union related labor

strife, the discouraging of interruption of education due to strikes and other illegal work stoppages and the ensuring to all educators of freedom of choice in affiliation with professional educator organizations.

5. PLEA has educator members in all thirteen (13) schools in the Metropolitan School District of Perry Township.

6. On or about July 25, 1978, defendant Perry Education Association (hereinafter "PEA") became recognized by the defendant Board as the bargaining representative of and for all full-time certificated school employees under a valid Regular or Temporary Teacher's Contract of the Metropolitan School District of Perry Township, excluding the superintendent and specified others.

7. On or about July 25, 1978, defendant PEA and defendant Board entered into an "Agreement" which is, in effect, a collective bargaining agreement pertaining to the respective rights, duties and obligations of all school employees included in the bargaining unit and the defendant Board.

8. The Agreement was a result and product of a series of negotiations between defendant PEA and defendant Board.

9. No member or representative of PLEA was present at the times or places that such Agreement was negotiated, discussed or bargained.

10. As a result of the terms of such Agreement, defendants PEA and Board have attempted to contract away, for the first time, rights which plaintiffs, jointly and separately, had enjoyed prior to the effective date of such Agreement and which rights are protected by the First Amendment of the United States Constitution.

11. By the terms of such Agreement, defendants PEA and the Board have contracted away the plaintiffs' right to use the inter-school mail system which, prior to the

execution of the Agreement between PEA and the Board, plaintiffs had been able to use.

12. By the terms of the Agreement, the use of the inter-school mail system, pursuant to Article II § 2D, became the exclusive province of the defendant PEA.

13. By the terms of the Agreement, the use of the teachers' mailboxes, pursuant to Article II § 2C, became the exclusive province of the defendant PEA.

14. Prior to the effective date of said Agreement, plaintiffs had been able to use the teachers' mailboxes but such right was contracted away by PEA and the Board.

15. The granting of the exclusive right to use the inter-school mail system and the teachers' mailboxes has effectively foreclosed to plaintiffs the effective communication with other members and professional associates with whom they had been able to communicate and associate prior to the execution of said Agreement.

16. Since PLEA was formed as an unincorporated association approximately six (6) years ago, there have been no incidents of "labor strife" or "labor disharmony" either between PEA and PLEA or between PLEA and the Board.

17. Members of PLEA neither perceive themselves to be or hold themselves out as members of a "union" or "labor organization", minority or otherwise, but rather as an unincorporated association of professional educators with common interests, concerns and needs to communicate and associate with each other and with other professional educators.

18. The inter-school mail system in Perry Township has traditionally been used as a public or quasi-public medium of communication of various kinds, including, but not limited to, church groups, cub scouts, YMCA's and YWCA's, Parochial Schools in Perry Township and

the private or quasi-private medium of a variety of personal communications (*e.g.* Christmas cards, etc.) which have nothing to do with official school or educational communications.

/s/ Evelyn E. Waddell
EVELYN E. WADDELL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 79-189-C

PERRY LOCAL EDUCATORS' ASSOCIATION, *et al.*,
Plaintiffs,

v.

WILLIAM HOHLT, *et al.*,
Defendants.

AFFIDAVIT OF FRANK KNIGGA

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

I, Frank Knigga, being duly sworn, depose and say:

1. I am an adult citizen of the United States and I reside in the Southern District of Indiana, Indianapolis Division.

2. I have been employed as a public school teacher by the defendant Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana, (hereinafter "Board").

3. I have been a member of the Perry Local Educators' Association (hereinafter "PLEA") since approximately 1973 and have served in the capacity as president of PLEA.

4. PLEA is an unincorporated association founded in 1973, the membership of which is open to all licensed educators employed by the Board who subscribe to and concur with the association's basis objectives which include, inter alia, the avoidance of union related labor strife, the discouraging of interruption of education due to strikes and other illegal work stoppages and the en-

suring to all educators of freedom of choice in affiliation with professional educator organizations.

5. PLEA has educator members in all thirteen (13) schools in the Metropolitan School District of Perry Township.

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8. The Agreement was a result and product of a series of negotiations between defendant PEA and defendant Board.

9. No member or representative of PLEA was present at the times or places that such Agreement was negotiated, discussed or bargained.

10. As a result of the terms of such Agreement defendants PEA and Board have attempted to contract away, for the first time rights which plaintiffs, jointly and separately, had enjoyed prior to the effective date of such Agreement and which rights are protected by the First Amendment of the United States Constitution.

11. By the terms of such Agreement, defendants PEA and the Board have contracted away the plaintiffs' right to use the inter-school mail system which, prior to the

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12. By the terms of the Agreement, the use of the inter-school mail system, pursuant to Article II, § 2D, became the exclusive province of the defendant PEA.

13. By the terms of the Agreement, the use of the teachers' mailboxes, pursuant to Article II § 2C, became the exclusive province of the defendant PEA.

14. Prior to the effective date of said Agreement, plaintiffs had been able to use the teachers' mailboxes but such right was contracted away by PEA and the Board.

15. The granting of the exclusive right to use the inter-school mail system and the teachers' mailboxes has effectively foreclosed to plaintiffs the effective communication with other members and professional associates with whom they had been able to communicate and associate prior to the execution of said Agreement.

16. Since PLEA was formed as an unincorporated association approximately six (6) years ago, there have been no incidents of "labor strife" or "labor disharmony" either between PEA and PLEA or between PLEA and the Board.

17. Members of PLEA neither perceive themselves to be or hold themselves out as members of a "union" or "labor organization", minority or otherwise, but rather as an unincorporated association of professional educators with common interests, concerns and needs to communicate and associate with each other and with other professional educators.

18. The inter-school mail system in Perry Township has traditionally been used as a public or quasi-public medium of communication of various kinds, including, but not limited to, church groups, cub scouts, YMCA's and YWCA's, Parochial Schools in Perry Township and the

private or quasi-private medium of a variety of personal communications (e.g. Christmas cards, etc.) which have nothing to do with official school or educational communications.

/s/ Frank Knigga
FRANK KNIGGA

The District Court's Memorandum of Decision is printed as Appendix C of the Petition, Pet. App. 35a-41a.

The District Court's Judgment Entry is printed as Appendix D of the Petition, Pet. App. 42a.

The Opinion of the Court of Appeals is printed as Appendix A of the Petition, Pet. App. 1a-33a.

The Order of the Court of Appeals Denying the Petition for Rehearing and Suggestion for Rehearing En Banc is printed as Appendix B of the Petition, Pet. App. 34a.

Motion to Dismiss or Affirm

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No. 81-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION,
Appellant,

vs.

PERRY LOCAL EDUCATORS' ASSOCIATION,
EVELYN E. WADDELL and JUDITH M. DIETRICH,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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MOTION TO DISMISS APPEAL OR TO AFFIRM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution is violated by a collective bargaining agreement between a public school district and an exclusive bargaining representative which grants use of the school-operated mail system to the exclusive bargaining representative while it denies the use of that system to other teacher organizations, where no limitations are placed on the content or purpose of the communications transmitted therein by the bargaining representative and where the school district allows numerous other organizations and individuals routinely to use that system for purposes unrelated to school business or functions.

2. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated by a collective bargaining agreement between a public school district and an exclusive bargaining representative which grants use of the school-operated mail system to the exclusive bargaining representative while it denies use of that system to other teacher organizations, where no limitations are placed on the content or purpose of the communications transmitted therein by the bargaining representative and where the school district allows numerous other organizations and individuals routinely to use that system for purposes unrelated to school business or functions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION,
Appellant,

VS.

PERRY LOCAL EDUCATORS' ASSOCIATION,
EVELYN E. WADDELL and JUDITH M. DIETRICH,
Appellees.

On Appeal From The United States Court of Appeals for the Seventh Circuit

---

MOTION TO DISMISS APPEAL OR TO AFFIRM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees Perry Local Educators' Association, Evelyn E. Waddell and Judith M. Dietrich move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Seventh Circuit on the ground that 28 U.S.C. §1254 does not authorize this appeal and the decision below is manifestly correct.

OPINIONS BELOW

The district court's opinion and judgment are unreported and reprinted in Appellant's Appendix at 35a-41a and 42a. The Court of Appeals' opinion is reported at 642 F.2d 1286, and is reprinted in Appellant's Appendix at 1a-33a.

PROVISIONS INVOLVED

Appellees agree with Appellant's recitation of the provisions involved in this appeal.

JURISDICTION

This Court lacks jurisdiction to consider this appeal under the statute relied upon by appellant, 28 U.S.C. §1254(2).[1]

STATEMENT OF THE CASE

Indiana law permits teachers and other employees to organize and to collectively bargain with school corporations over salary, wages, hours and related fringe benefits. Ind.Code §20-7.5-1-3. That bargaining and the resulting contract, however, can be entered into only between an exclusive employee bargaining representative and the employer, Ind.Code §20-7.5-1-4, and Indiana law provides a mechanism for determining the exclusive bargaining representative of the employees. Ind.Code §20-7.5-1-10. Consistent with this statutory scheme, in 1977,

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[1] 28 U.S.C. §1254(2) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

appellee Perry Local Educators' Association [PLEA] and appellant Perry Education Association [PEA] campaigned for the exclusive right to represent the teachers of the Metropolitan School District of Perry Township [School District]. PEA prevailed in the election and was formally certified by the Indiana Education Employment Relations Board to be the exclusive bargaining representative.

Prior to 1978, both PEA and PLEA[2] had been granted access to and use of the internal mail system to solicit support for their respective organizations, to provide information of various sorts to the employees of the School District, and to garner support for their respective points of view on issues of concern to the community. Equally so, the School District allowed numerous private outside individuals and organizations such as the Cub Scouts, YMCAs, church groups and parochial schools, to utilize the mail system for purposes which had nothing to do with official school or educational concerns. During this time, the record demonstrates that no labor disharmony or interference with orderly school processes flowed from this grant of access to these various organizations. The record discloses no criteria employed by the School District by which it differentiated between the various organizations which were granted or denied access to the mail system, and no criteria governed the kinds of expressions (e.g. political, civic, religious, personal, etc.) which were allowed to be communicated through the mail system.

However, in 1978, PEA, as the exclusive bargaining representative of the Perry Township teachers, struck a deal with the School District by which PLEA was denied any further access to the mail system. However, PEA maintained its unfettered access to that system. There is no

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[2] For purposes of this Brief, Appellees Perry Local Educators' Association, Evelyn E. Waddell and Judith M. Dietrich shall collectively be referred to as PLEA.

evidence that PEA's continued use of the mail system was limited to communications relevant to discharging its legal duties as exclusive bargaining representative. Finally, the record is devoid of any evidence that use of the mail system in Perry Township by PLEA would create any disruption of school activities or materially interfere with legitimate school business or functions.

A.

THIS COURT LACKS JURISDICTION OVER THIS CASE UNDER 28 U.S.C. §1254

PEA asserts that 28 U.S.C. §1254(2) confers appellate jurisdiction upon this Court by virtue of the following logic: For purposes of §1254, an ordinance is a statute. Any contract entered into by a public agency is an ordinance. The Seventh Circuit declared the collective bargaining agreement to be violative of the First and Fourteenth Amendments to the United States Constitution, and thus, according to PEA, determined, for purposes of §1254(2), that the underlying and authorizing statute was unconstitutional as well. This reasoning is seriously flawed.

First, Ind.Code §20-7.5-1-3 permits school districts to bargain collectively for those items set forth in Ind.Code §20-7.5-1-4: salary, wages, hours, salary and wage-related fringe benefits, and a mechanism to resolve grievances. PLEA has never quarrelled with the constitutionality of that statute and the Seventh Circuit did not declare the statute to be unconstitutional. Rather, PLEA attacked the application of that statute to the extent that it provided authority to PEA and the School District to contract away PLEA's First Amendment right to utilize the internal mail system within the School District.

Second, to the extent that the collective bargaining agreement is violative of the teachers' constitutional rights, it is also violative of the very statute which PEA contends authorizes collective bargaining. *See*, Ind.Code §20-7.5-1-

1(d)(iv) which recognizes and seeks to enforce those rights guaranteed to public school teachers by the United States Constitution. Therefore, to the extent that a School District impinges upon the rights of teachers guaranteed by the First Amendment, its actions are in conflict with the statute.

Third, the logic of PEA's position would command an infinite expansion of this Court's appellate jurisdiction under 28 U.S.C. §§1254(2) and 1257(2). Under PEA's reading, every act of a state agency authorized by state law which a federal court determines to be unconstitutional or which a state court determines to be constitutional would be reviewable automatically by this Court. With the ever increasing occurrence of public sector collective bargaining, the opportunities for constitutional challenges to contractual provisions will increase simultaneously. Under PEA's logic, all such constitutional challenges would be reviewable by this Court even though the underlying statute is not placed under attack. For example, an attack on a contractual grievance procedure which a state court found to be constitutional under the Due Process Clause, or which a federal court found not to comport with due process, would be subject to an automatic appeal. The same result would obtain where a teacher claims that vacation time contractually agreed to between a union and public employer violated a teacher's First Amendment right to the free exercise of his religion. The list is, indeed, endless. Thus, any extension of the doctrines set forth in *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203 (1948) and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921) [construing Section 267 of the Judicial Code, the predecessor of 28 U.S.C. §1257(2)] to cover this case would invite a deluge of appeals to be lodged in this Court to the detriment of this Court's ability to respond to the myriad cases which it is asked to review selectively by writs of certiorari. For these reasons, this appeal should be dismissed.

B.

THE JUDGMENT OF THE SEVENTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

PLEA concedes that the decision by the Seventh Circuit Court of Appeals is in conflict with decisions of the Second[3] and Sixth[4] Circuit Courts of Appeals. However, the decision is in full accord with rulings by this Court and, thus, this appeal should be dismissed or the judgment below should be affirmed.

The Seventh Circuit determined that selective denial of access to the school mail system which is otherwise utilized by numerous divergent organizations and individuals for a variety of purposes both related and unrelated to school business violated the First Amendment's guarantee of free speech and the Fourteenth Amendment's guarantee of equal protection of the laws. In so ruling, the Seventh Circuit employed the traditional analysis required by the holdings of this Court, and thus, contrary to appellant's contentions, "the court of appeals' analysis and application of the controlling principles is" in no way in conflict with the decisions of this Court. PEA *Jurisdictional Statement* at 10.

1. First Amendment Analysis

Because the School District chose to allow so many different groups and individuals to utilize the mail system, including PEA, the Cub Scouts, YMCAs, parochial schools, individual teachers and the like, the court of appeals was persuaded that the contractual prohibition which denied

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[3] *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2nd Cir. 1976).

[4] *Memphis American Federation of Teachers Local 2032 v. Board of Education*, 534 F.2d 699 (6th Cir. 1976).

PLEA equal access was either speaker or content based. The discrimination employed in granting access to some and denying it to others, the court found, could only be justified if it was "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it [drew] must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-462 (1980). In so ruling, the Seventh Circuit expressly relied upon *Police Department of City of Chicago v. Mosely*, 408 U.S. 92 (1972), wherein this Court held:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [citations omitted]
>
> * * *
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more conventional views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id., 408 U.S. at 95-96. Indeed, as the court of appeals emphasized, the state is prohibited from "dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). Thus, the Seventh Circuit determined that unless the School District could prove that the discrimination against PLEA was

finely tailored to serve substantial state interests, the exclusion would violate PLEA's First Amendment right of free speech.

The court of appeals examined the justifications asserted by PEA and the School District to deny PLEA access to the mail system and found them wanting. *See*, PEA's Appendix, at 28a-31a. For example, PEA contended that exclusive use of the mail system was justified by its role as exclusive bargaining agent for all the teachers. But, as the court of appeals explained, the access policy does nothing to further this interest, particularly since the collective bargaining agreement does not limit PEA's use of the system to messages related to its special legal duties; and the School District permits so many other groups to use the system for their private, parochial purposes. Moreover, PEA failed to demonstrate, or even imply, that PLEA's use of the mail system would interefere with PEA's efforts to represent all employees.

Second, PEA asserted that the exclusion of PLEA from use of the mail system was justified by the state's interest in promoting labor harmony. While this is a laudable and legitimate state interest, the School District[5] and PEA, as defenders of the exclusionary clause of the collective bargaining contract, failed to demonstrate that the means chosen to effect this policy were based on "reasonable inferences drawn from concrete facts, not on mere apprehension or speculation that disturbances or interferences with appropriate discipline will occur." *Healy v. James*, 408 U.S. 169, 189 (1972). *See also, Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508-509 (1969); *Connecticut St. Federation of Teachers v. Board of Education Members, supra*, 538 F.2d at 478. As the court of appeals found, the record is devoid of

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[5] Significantly, the School District chose not to appeal the decision by the court of appeals.

any evidence that school operations ever have been or likely ever will be disrupted by PLEA's use of the mail system. Indeed, one of PLEA's tenets is its opposition to labor strife. *See*, Affidavits of Knigga, Waddell and Dietrich. Consequently, both justifications for the collective bargaining clause granting PEA exclusive access to the mail system are unsupportive of the state interests sought to be enforced.[6] Thus, the denial of PLEA to access to the mail system is not "finely tailored to serve [a] substantial state interest," *Carey v. Brown*, *supra*, and was correctly struck down.

PEA desperately grasps at *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) and *Greer v. Spock*, 424 U.S. 828 (1976) to undermine the court of appeals' decision. Neither case, however, serves to accomplish PEA's goals. Both *Greer* and *Lehman* stand for the proposition that the government may choose to allow only certain subjects to be aired in a public facility without offending the Free Speech clause of the First Amendment or the Equal Protection components of the Fifth and Fourteenth Amendments. In both *Greer* and *Lehman*, the restrictions imposed had no readily discernible tendency to favor particular viewpoints or doctrines. Thus, unlike *Mosely* and *Carey*, which involved ordinances banning all but labor picketing in certain areas, the *Greer* and *Lehman* restrictions were subject matter neutral. As the court below stated in reconciling these two lines of cases:

> Viewpoint—neutrality . . . helps explain why speech restrictions keyed to the identity of the speaker are

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[6] In the court of appeals, PEA also suggested that the availability of alternate means of communication to PLEA either eviscerates its claim to access to the mail system or renders it *de minimus*. However, it has long been held that the availability of other fora for speech is irrelevant to the issue of access to a particular forum. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. State*, 308 U.S. 147, 163 (1939). *See also*, Tribe, *American Constitutional Law*, 684 (1978).

> always scrutinized strictly: they almost invariably are not neutral with respect to the viewpoints they tend to disfavor.

PEA Appendix at 19a. Thus, once a governmental body permits one speaker to utilize a forum for political purposes, it cannot exclude others absent a showing of a compelling state interest.

In this case, the school system has permitted political and nonpolitical speech to circulate in the mail system,[7] and has chosen to exclude only PLEA's use of the system. Unlike *Greer* and *Lehman* the only discrimination practiced here is that between the speakers; there is no discrimination between the subject matter of speech allowed and the speech prevented from being exchanged within the mail system. Moreover, reliance upon *Greer v. Spock, supra*, is particularly inappropriate since it announced a rule applicable only to the rarefied setting of a military base. As this Court explained in *Parker v. Levy*, 417 U.S. 733, 743 (1974): "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. * * * The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'[Citation omitted]." *Id.* 417 U.S. at 759. The Court added: "Speech that is protected in the civil population may...undermine the effectiveness of response to command." *Id.* Thus, while enlisted personnel do not shed all First Amendment rights when they enter military service "the different character of

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[7] *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) recognized "the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political." PEA does not and, based on the record, cannot deny that they have used the mail system for purposes other than just representing the Perry Township teachers.

the military community and of the military mission requires a different application of those protections." *Id.*, 417 U.S. at 758. As the Court in *Brown v. Glines*, ___ U.S. ___, 100 S.Ct. 594, 599 (1980) explained: "Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base. *Greer, supra*, 424 U.S., at 840, 96 S.Ct., at 1218; *id.*, at 841, 96 S.Ct., at 1219 (BURGER, C.J. concurring); *id.*, at 848, 96 S.Ct. at 1222 (POWELL, J. concurring)." Thus, the *Brown* court rejected the compelling state interest test in favor of the "reasonably necessary to protect the substantial governmental interest" test, and approved an Army regulation which required military personnel to secure approval by a commanding officer before he circulated a petition on a military base. This policy could not survive in the civil world. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

If the School District were a military base, or if the School District had limited use of the mail system exclusively to PEA to discharge its duties as bargaining representative, PEA might have been on sound footing. Rather, the access policy challenged here grants unfettered use of that system to PEA and others to the exclusion of PLEA. This discrimination is entirely speaker-based and is therefore unconstitutional.

2. Equal Protection Analysis.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), established what has commonly been referred to as the two-tier analysis of equal protection claims brought under the Fourteenth Amendment: government classifications that infringe on fundamental rights and classifications along suspect lines must be closely tailored to meet a compelling state interest, but other classifications need only be rationally related to a legitimate state interest. As the court below found, the analysis under the First and Fourteenth Amendments is virtually identical where the right of free speech is implicated.

> Because free speech is a fundamental right, and because discrimination between speech or speakers, to the extent that it operates as a form of censorship, implicates that right, the fundamental rights strand or strict scrutiny applies to such discrimination. The particular identity of equal protection and first amendment analyses in differential access cases follows logically from the explicit constitutional designation of speech as fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee.

PEA Appendix at 20a-21a.

Since this case involved a restriction on PLEA's fundamental right of free speech, the Seventh Circuit analyzed the justifications for the restriction to determine if they supported a compelling state interest and if the means chosen to accomplish that interest were closely tailored to fit that interest. Like its conclusion under the First Amendment claim, the Seventh Circuit concluded that the interest claimed to be pursued—preservation of labor peace and fulfilling PEA's role of bargaining representative—may indeed be compelling, but the means chosen to effect that interest were deficient.

> The access policy presently is force in both overinclusive and underinclusive with respect to that asserted justification: overinclusive, because the collective bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties, and hence does not exclude messages simply critical of PLEA; underinclusive, because the school district permits outside organizations with no special duties to the teachers to use the system.

PEA Appendix at 29a.

In the face of this, PEA urges this Court to review the court of appeals' decision because the School District "has legitimate reasons to open its communication facilities for

the fulfillment of [the duty to represent teachers] without opening those facilities to others who have no such duty to perform, and indeed whose presence might defeat the goal . . . of 'prevent[ing] inter-union rivalries from creating dissension within the work force.' [Citation omitted]." PEA *Jurisdictional Statement* at 17.

Again, had the grant of access to the mail system been so limited, had outside organizations and individuals not been granted access to the exclusion of PLEA and had there been some evidence of labor strife while PLEA had access to the mail system, PEA's position might be supportable. Only its mischaracterization of the facts, however, permits it to assert that the court of appeals' decision "achieved a result at odds with controlling decisions of this Court." PEA *Jurisdictional Statement* at 15. Thus, this appeal either should be dismissed or the decision of the court of appeals affirmed.

3. The Practical Effect.

Prior to 1978, the School District granted PEA, PLEA and untold other individuals and groups access to the internal mail system. There is no evidence that the school system suffered any disruption during this period of time. Moreover, since PEA has assumed the role of exclusive bargaining agent for the Perry Township teachers, PLEA has remained extant, challenging the policies and practices of PEA, again without interferring with orderly school processes or disrupting the central business of the school system—the education of children. Despite PEA's doomsday predictions, there is no evidence that the tenor of the educational environment will be changed in any respect should PLEA again gain access to the mail system. Equally so, there is no evidence that this school system will deny access to all who have thus far used the mail system peacefully and cooperatively should the court of appeals' judgment stand. Nor is there any evidence, despite PEA's picture of gloom, that other public agencies will close

internal communication systems to all should the judgment of the court of appeals be followed elsewhere.[8] PEA's domination of access to the mail system will, however, end. PEA, and perhaps others, will be forced to compete in the market place of ideas solely by means of the strength of their ideas and programs, rather than by virtue of their monopolistic access to the most viable means of communication. If this is what PEA fears, then neither the First nor the Fourteenth Amendments should nor will provide it a shield. In the meantime, nothing ordered by the court below will in any way impede PEA's ability to carry out its obligation to the teachers of Perry Township to negotiate with the School District. Thus, contrary to PEA's protestations, the Seventh Circuit's decision will have minimal impact on the operations of school systems or other public agencies.

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[8] Significantly, PEA's attempts to demonstrate the potential widespread fallout from the Seventh Circuit's decision by citing three regulations now in effect in the federal government which this decision may affect, two of which apply to the military and one of which applies to the Federal Aviation Administration. *See, Jurisdictional Statement.* p. 13, n. 12. But, as proclaimed in *Brown v. Glines, supra*, the military requires different rules of order because of its unique place in American society. *See,* pp.10-11, *supra.*

CONCLUSION

For the reasons set forth above, this Court should dismiss this appeal or affirm the judgment of the United States Court of Appeals for the Seventh Circuit. In the event this Court determines that this is an improvident appeal and converts it into a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted,

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Appellant's Brief

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No. 81-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION,
Appellant,

v.

PERRY LOCAL EDUCATORS' ASSOCIATION,
EVELYN E. WADDELL AND JUDITH M. DIETRICH,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Is the First Amendment (as incorporated into the Fourteenth Amendment) to the United States Constitution violated when a union that has been elected by public school teachers as their exclusive collective bargaining representative is granted access to certain communication facilities in the schools that are not "public forums" in order to perform its representational functions, while such access is denied to a rival union that is not the exclusive collective bargaining representative?

2. Is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution violated when a union that has been elected by public school teachers as their exclusive collective bargaining representative is granted access to certain communication facilities in the schools that are not "public forums" in order to perform its representational functions, while such access is denied to a rival union that is not the exclusive collective bargaining representative?

LIST OF PARTIES

In addition to the parties listed in the caption, the following were co-defendants with appellant in the district court, and co-appellees with appellant in the court of appeals:

William Hohlt, Robert Bush, Thomas Cochran, James Stainbrook, Jr., and Richard A. Poppa, individually and as members of the Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana.

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IN THE

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EVELYN E. WADDELL AND JUDITH M. DIETRICH,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR APPELLANT

OPINIONS BELOW

The district court's opinion and judgment are unreported, and reprinted in the Appendix to the Jurisdictional Statement at App. 35a-41a and App. 42a, respectively.[1] The court of appeals' opinion is reported at 652 F.2d 1286, and is reprinted at App. 1a-33a.

JURISDICTION

This is an appeal from a decision of the Court of Appeals for the Seventh Circuit holding invalid, as repugnant to the United States Constitution, two provisions in a collective bargaining agreement between a public school district and the union that is the exclusive collec-

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[1] In this brief, "App." refers to the Appendix to the Jurisdictional Statement, and "JA" refers to the Joint Appendix.

tive bargaining representative of its teachers. The court of appeals issued its opinion on June 24, 1981. A timely petition for rehearing was denied on August 14, 1981 (App. 34a). The Jurisdictional Statement was filed on November 12, 1981, and a timely notice of appeal was filed in the court of appeals (App. 43a).

Appellant believes that this Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1254(2), and the grounds for this belief are set forth in the Jurisdictional Statement at 2-3, n. 1. This Court, by Order dated January 11, 1982, ruled that:

> Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. [50 U.S.L.W. 3547.]

Appellant also requested in the Jurisdictional Statement, at 18, that "in the event this Court determines that there is no jurisdiction under 28 U.S.C. § 1254(2), a writ of certiorari should issue". The discussion in the Jurisdictional Statement, at 9-17, demonstrates that the issues presented, if not cognizable on appeal, warrant review by certiorari.[2]

PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are involved on this appeal:

> Amendment I. Congress shall make no law . . . abridging the freedom of speech, or of the press; or

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[2] Title 28 U.S.C. § 2103 provides, in pertinent part:

> If an appeal to the Supreme Court is improvidently taken from the decision . . . of a United States court of appeals, in a case where the proper mode of review is by petition for certiorari, this alone shall not be grounds for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

See also, *El Paso v. Simmons*, 379 U.S. 497, 502-503.

the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

Amendment XIV, Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Public Law 217 of the 1973 Indiana General Assembly, Title 20, Art. 7.5 of the Indiana Code Annotated—the statute regulating labor relations between public school corporations in Indiana and their certificated employees—are reprinted at App. 45a-54a, and the relevant provisions of the rules and regulations implementing the statute are reprinted at App. 55a-56a.

The provisions of the collective bargaining agreement between petitioner and the Metropolitan School District of Perry Township, Indiana, involved on this appeal are as follows:

Article II

Association Rights and Responsibilities

* * * *

Section 2—Communications

* * * *

C. The [Perry Education] Association is permitted access, to teachers' mailboxes in which to insert material, provided the Association makes a copy available to the building principal in advance of the distribution. The Association's sponsorship shall appear on all materials which are distributed through teachers' mailboxes. The rights and privileges of the Association, acting as the representative of the teachers, as set forth in Article II, Section 2 part C of this agreement shall not be granted to any other school employee organization as defined in IC 1971, 20-7.5 more commonly known as PL 217.

D. The Association shall be permitted to use the inter-school mail system provided that the school

corporation shall have no obligation to make special arrangements, incur extra expenses, or devote time beyond that required for inter-school mailing normally and routinely instituted by the school corporation. The rights and privileges of the Association, acting as the representative of the teachers, as set forth in Article II, Section 2 part D of this Agreement, shall not be granted to any other school employee organization as defined in IC 1971, 20-7.5 more commonly known as PL 217.

STATEMENT OF THE CASE

Public Law 217 of the 1973 Indiana General Assembly, Title 20, Art. 7.5 of the Indiana Code Annotated (hereinafter "Indiana Statute" or "Statute") authorizes public school teachers to select a union to represent them in collective bargaining with their employing school district. The union selected by a majority of the teachers in an appropriate collective bargaining unit is designated as the "exclusive representative" of all the teachers in that unit. Ind. Code Ann., Section 20-7.5-1.2(1) (App. 46a).

The Indiana Statute establishes procedures by which teachers can select an exclusive representative from among competing unions. Those procedures were invoked in 1977 to determine whether appellant Perry Education Association (hereinafter "PEA") or appellee Perry Local Educators' Association (hereinafter "PLEA") would be the exclusive representative of the teachers employed by the Metropolitan School District of Perry Township (hereinafter "School District"). The Indiana Education Employment Relations Board, the state agency responsible for administering the Statute, directed that a representation election be held, and that during the election campaign PEA and PLEA be accorded equal access to in-school communication facilities (JA 20-21).[3] PEA won

[3] Neither organization was to be permitted access to "any inter-school mail system or school mailbox," but both were to be permitted access to other designated facilities (JA 20-21).

the election and was certified by the Board as the exclusive representative (JA 4-5, 20; App. 2a).

Under the Indiana Statute, the neutrality of access that prevails during a representation contest is not required once an exclusive representative has been chosen. At that point, the Statute permits the school district to provide access to school communication facilities to the union selected, "for the discharge of the exclusive representative's duties of representing the bargaining unit and its individual members," without having to provide such access to rival unions. See App. 9a-10a and n. 13. See also *Pike Independent Professional Educators*, No. U-76-16-5350 (May 20, 1977), reprinted at App. 57a-64a. This preferential access may continue only while the status of the exclusive representative is insulated from challenge (JA 20-21; App. 4a, n.2). (Under the Indiana Statute, the insulation period is in most instances two years (App. 54a; see also App. 55a-56a)).

PEA and the School District entered into a collective bargaining agreement in 1978. Among other things, the agreement gave PEA "access to teachers' mailboxes in which to insert material"[4] and the right to use "the inter-school mail system" by which the School District delivers materials between school buildings.[5] The agreement stated that the foregoing "rights and privileges" were being accorded to PEA "acting as the representative

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[4] The mailboxes consist of individualized boxes or slots in each school building bearing the names of the teachers (JA 15). The collective bargaining agreement conditioned PEA's right to insert materials in the mailboxes upon PEA's first making a copy of the materials available to the building principal and identifying its sponsorship on the materials (p. 3, *supra*).

[5] The collective bargaining agreement qualified PEA's right to use the inter-school mail system by the proviso that "the school corporation shall have no obligation to make special arrangements, incur extra expenses, or devote time beyond that required for inter-school mailing normally and routinely instituted by the school corporation" (pp. 3-4, *supra*).

of the teachers . . .," and that they "shall not be granted to any other school employee organization. . . ." (The relevant provisions of the collective bargaining agreement are quoted in full at pp. 3-4, *supra*).

Proceedings In The District Court

This lawsuit was filed in the United States District Court, Southern District of Indiana, Indianapolis Division, in 1979 by PLEA and two teachers employed by the School District who are members of PLEA. Plaintiffs challenged the above-described provisions of the collective bargaining agreement between PEA and the School District, contending that PEA's preferential access to the teacher mailboxes and inter-school mail system (hereinafter "school mail facilities") violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Named as defendants were the members of the School District's Board of Education (in their individual and official capacities) and PEA. As relief, the complaint sought, *inter alia*, an injunction against the continued provision of preferential access to PEA, and compensatory damages (JA 3-9).[6]

Defendants moved for summary judgment (JA 22-23, 26). Plaintiffs opposed summary judgment (JA 27-28), and "in the alternative" cross-moved for summary judgment (JA 27-28).

The district court granted the defendants' motions for summary judgment (App. 35a). With respect to the First Amendment claim, the court stated that the "normal

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[6] The collective bargaining agreement in effect at the time suit was filed was renewed in 1980, without change in the provisions respecting access to school mail facilities (App. 3a-4a). The agreement was renegotiated again, subsequent to the court of appeals' decision declaring the provisions respecting access to mail facilities invalid. The School District at that time declined to continue those access provisions in effect, lest it be in contempt of the court of appeals' ruling. But the School District and PEA agreed in writing that the access provisions would automatically be reinstated if the court of appeals' decision is reversed.

and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to the teachers." (App. 38a). Concluding that these facilities were, therefore, not public forums (*id.*), the court quoted *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471, 481 (2d Cir. 1976), for the proposition that the School District has "no constitutional obligation *per se* to let any organization use the school mail boxes . . . to communicate its views to the teachers . . . whether or not the subject matter of the communication is school related." (App. 39a). The court further found that no First Amendment right respecting access to a non-public forum was violated, given PEA's status "as the duly-elected exclusive bargaining agent for all teachers in the Perry Township schools" and the availability to PLEA of ample alternative means to communicate with teachers (App. 39a).

The district court then turned to the Equal Protection claim. Noting "the very different status of . . . PEA as the recognized collective bargaining representative for *all* Perry Township teachers, and PLEA, as a rival teacher group . . ." (App. 40a; emphasis in original), the court found that the differential treatment bore "a rational relationship to the goal of labor peace within the schools and school system," and thus did not violate the Equal Protection Clause. (App. 40a-41a).

The Court of Appeals' Decision

The court of appeals reversed. It agreed with the district court that the school mail facilities are not a public forum (App. 23a-24a, 31a; see also 7a). It acknowledged that PEA "has legal duties to the teachers with respect to bargaining and contract administration that other unions and individuals do not have, and which require it to have an efficient method of communicating with the teachers" (App. 28a; see also 29a), but found this difference between PEA and rival unions irrelevant

to the issue before it. The issue, according to the court, was not whether the School District has a "legitimate interest in allowing PEA to use the mail system . . .", as it concededly does, but whether it has an "interest in making PEA's use *exclusive*" (App. 29a; emphasis in original). The court answered this question in the negative:

> Without an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone. The defendants do not contend that equal access for others would impose significant additional expenses on the school district, nor that it would interfere wi[illegible] PEA's execution of its duties as bargaining representative in any way. [App. 29a].

Accordingly, the court concluded that once the School District "opens its internal mail system to PEA," the denial of "equal access" to PLEA "violates both the equal protection clause and the first amendment as incorporated into the fourteenth." (App. 7a, 14a, 29a, 31a).[7]

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[7] In the course of its analysis rejecting the district court's holding that the distinction was justified because PEA has legal duties to the teachers as the exclusive representative that PLEA does not have, the court of appeals made the following comment:

> The access policy presently in force is both overinclusive and underinclusive with respect to that asserted justification: overinclusive, because the collective bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties, and hence does not exclude messages simply critical of PLEA; underinclusive, because the school district permits outside organizations with no special duties to the teachers to use the system. [App. 29a].

The assertion by the court of appeals that the collective bargaining agreement does not limit PEA's use of the school mail facilities to communications relevant to its duties as exclusive representative (see also App. 10a, n. 13) is without record support, as we show *infra*, at 19, n. 16. In any event, this factual error was immaterial to the court's decision, for the court was explicit that *even if*

SUMMARY OF ARGUMENT

The decision below is bottomed on the proposition that there is a constitutional right of "equal access" to nonpublic forums that precludes a government employer from distinguishing between the exclusive collective bargaining representative and rival unions in granting access to internal communication facilities. That proposition would invalidate the prevailing practice in federal, state and local public sector labor relations and is inconsistent with principles established by this Court.

The starting point for analysis is that, as both the district court and the court of appeals correctly held, the school mail facilities are a nonpublic forum. But after so holding, the court below did not judge the legitimacy of the School District's access policy by the standard this Court has decreed for such forums. Instead, the court below imposed a requirement of "equal access" subject only to "time, place, and manner" regulations, which is the standard this Court has held applicable to *public* forums. The quite different standard governing access to *nonpublic* forums was set forth in *United States Postal Service v. Council of Greenburgh Civic Association*, —— U.S. ——, 49 U.S.L.W. 4813, 4818, n. 7: the government's decisions respecting access are constitutional so long as "reasonabl[e]" and "content-neutral."

PEA's access were confined to its representational functions "that would not change the result." (App. 10a, n. 13, 29a).

The court of appeals' other observation—that "the school district permits outside organizations with no special duties to the teachers to use the system" ("[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units" had been permitted access on occasion (App. 4a))—admittedly played no part in its decision. The court concluded that the school mail facilities are not a public forum (App. 23a-24a, 31a), and "stress[ed]" that its invalidation of the access rule "is premised entirely on the discrimination between members of PEA and other teachers" (App. 31a).

The access provisions here in question are "reasonable." The district court expressly found that the differential treatment bears "a rational relationship to the goal of labor peace within the schools and school system" (App. 40a), and the court of appeals acknowledged that the exclusive representative "has legal duties to the teachers with respect to bargaining and contract administration that other unions and individuals do not have, and which require it to have an efficient method of communicating with the teachers" (App. 28a, 29a). The access provisions also are "content-neutral." PLEA is not denied access "merely because public officials disapprove [its] view." *Postal Service supra*, 49 U.S.L.W. at 4818. On the contrary, the respective views of PEA and PLEA are irrelevant: PEA is accorded access to the school mail facilities because the use of those facilities enables it more effectively to perform the statutory obligations imposed upon it as exclusive representative; PLEA is denied access because it does not have such obligations. The differentiating factor, in short, is not "the speaker's *view*," but rather PEA's *status* as exclusive representative and the statutory duties that accompany that status.

The controlling principles respecting nonpublic forums articulated in this Court's decisions preclude the lower court's attempted intrusion upon the government's power to control the uses to which governmental property is put. As the access policy here is reasonable and content-neutral, it is wholly consistent with the Constitution.

ARGUMENT

THE PROVISION OF ACCESS TO SCHOOL MAIL FACILITIES TO THE EXCLUSIVE BARGAINING REPRESENTATIVE FOR THE PERFORMANCE OF ITS REPRESENTATIONAL DUTIES, BUT NOT TO A RIVAL LABOR ORGANIZATION THAT HAS NO SUCH DUTIES, DOES NOT VIOLATE THE FEDERAL CONSTITUTION

PEA is, by virtue of having prevailed in an election conducted pursuant to state statutory procedures, the certified exclusive collective bargaining representative for the teachers in the School District. That status carries with it certain obligations which neither PLEA nor any other organization has in the School District:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. [*Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209, 221].

The ability of PEA to fulfill those statutory obligations is enhanced by having access to convenient and expeditious means of communicating with the teachers it represents (see App. 28a-29a), and for that reason it has been provided access to the school mail facilities. PLEA seeks the same access as PEA although, by virtue of having lost the representation election, it does not have the same status or the concomitant statutory obligations. Indeed, PLEA's use of those facilities would run counter to the State's interest in establishing a system of exclusive recognition:

> The designation of a single representative . . . prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the em-

> ployer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations. [*Abood*, 431 U.S. at 220-221].

The question here is whether the court below was correct in holding that the Constitution requires the School District to grant PLEA the same access to the school mail facilities as it grants PEA. As we now show, the Constitution does not require that result.

1. The starting point for analysis is that, as both the district court and the court of appeals correctly held, the school mail facilities are a nonpublic forum. This Court reiterated last Term the test for distinguishing between public and nonpublic forums in *United States Postal Service v. Council of Greenburgh Civil Association*, —— U.S. ——, 49 U.S.L.W. 4813, 4818 (hereinafter "*Postal Service*"):

> [T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer v. Spock* [424 U.S. 828], the Court cited approvingly from its earlier opinion in *Adderley v. Florida* [385 U.S. 39], wherein it explained that "[*t*]*he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated*," 424 U.S. 828, 836. [Emphasis added].

There can be no serious dispute about the fact that here the school mail facilities have been "preserve[d] . . . for the use to which [they are] lawfully dedicated." "[T]heir normal and intended function is to facilitate internal communication of school-related matters to the teachers" (App. 38a). In the present context the phrase "school-related matters" derives meaning from two sources. The first is the inherent function of any school district to educate students. The second source is the Indiana statute that governs labor relations within the School District, and, more specifically, the representational duties that statute imposes upon the exclusive representative. Those duties are "continuing and difficult" (*Abood*, *supra*, 431

U.S. at 221), serve the School District's interest in labor peace (*Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 66-70; *Abood supra*, 431 U.S. at 220-221, 224) and require that the exclusive representative be afforded "an efficient method of communicating with the teachers" (App. 28a-29a). In short, the decision of the School District to allow PEA to use the school mail facilities in order to perform its duties as exclusive representative does not in any sense alter the nonpublic character of those facilities. On the contrary, such use is wholly consistent with "preserv[ing] the property . . . for the use to which it is lawfully dedicated." *Postal Service*, 49 U.S.L.W. at 4818.

2. While correctly recognizing that the school mail facilities are a nonpublic forum, the court below did not judge the legitimacy of the School District's access policy by the standard this Court has decreed for such forums. The court below imposed a requirement of "equal access" subject only to "time, place, and manner" regulations, which is the standard that this Court has held applicable to *public* forums. But the quite different standard applicable to *nonpublic* forums was set forth in *Postal Service*, *supra*, 49 U.S.L.W. at 4818, n. 7:

> [P]roperty owned or controlled by the government which is *not* a public forum may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment. Admittedly, the government must act reasonably in imposing such restrictions, *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 130-131 (1977), and the prohibition must be content-neutral. [Emphasis in opinion].

And as we now show, when judged by the standard stated in *Postal Service*, the access policy involved here passes constitutional muster.

a. The School District's access policy—which permits the exclusive representative but not rival unions to use the school mail facilities—is "reasonable." The district court expressly found that the differential treatment bears "a

rational relationship to the goal of labor peace within the schools and school system" (App. 40a), and the court of appeals did not dispute that the exclusive representative "has legal duties to the teachers with respect to bargaining and contract administration that other unions and individuals do not have, and which require it to have an efficient method of communicating with the teachers" (App. 28a). PLEA seeks access neither to facilitate education of students nor to perform any duty imposed by Indiana law—the "use[s] to which [the school mail facilities are] lawfully dedicated," *Postal Service*, *supra*, 49 U.S.L.W. at 4818.

That an access distinction between exclusive bargaining representatives and rival unions is "reasonable" is confirmed by the practice throughout American labor relations. In recognition of the unique representational obligations imposed upon the exclusive representative, the National Labor Relations Act permits a private sector employer to grant the exclusive representative access to internal forums for communicating with members of the bargaining unit without thereby incurring a duty to provide such access to rival unions.[8] That likewise is the rule

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[8] *See, e.g., NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968); *International Ass'n. of Mach. & A. Wkrs. Dist. No. 9 v. NLRB*, 415 F.2d 113, 115 (8th Cir. 1969); *General Motors Corp.*, 240 NLRB 168 n. 1, 169-171 (1979) (and see cases cited therein).

In suggesting otherwise (App. 7a-9a), the court of appeals misread this Court's opinion in *NLRB v. Magnavox*, 415 U.S. 322. Section 7 of the NLRA, 29 U.S.C. § 157, gives each employee a protected right to distribute literature in non-working areas of the employer's premises during non-working time. *Magnavox* held that this right is personal to the employee, and cannot be waived by the exclusive representative. But employees do not have a § 7 right of access to bulletin boards or other communication facilities, and *Magnavox* did not purport to require equality of access in that regard. Indeed, the exclusive representative in *Magnavox* had negotiated a provision that this Court did not disturb according it sole access to bulletin boards. 415 U.S. at 323, 326. In the instant

both with respect to federal government employees [9] and with respect to state and local government employees in those states (the majority [10]) that have enacted exclusive recognition statutes to govern public employee labor relations [11]—and preferential access arrangements of this type

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case, appellees were free to distribute literature in non-working areas of the schools during non-working time (App. 28a). In short, the court of appeals was wrong in suggesting that PEA's preferential access to the school mail facilities would violate the NLRA if furnished by a private employer.

[9] Congress has provided a system of exclusive representation for federal employees in the Civil Service Reform Act of 1978, 5 U.S.C. § 7111. Prior to 1978, exclusive representation was authorized in Executive Order 11491. In federal employment, differentiation in access is not merely *permitted*, it is *required* (*i.e.*, it is an unfair labor practice for federal agencies to grant access to internal communication facilities to unions other than the exclusive representative). *See, e.g., Department of the Army, U.S. Army Natick Laboratories, Commissary Store Complex, Oakland*, A/SLMR No. 654 (U.S. Dept. of Labor, 1976); *Commissary, Fort Meade, Department of the Army*, A/SLMR No. 793 (U.S. Dept. of Labor, 1977); *Department of the Air Force, Grissom Air Force Base*, A/SLMR No. 852 (U.S. Dept. of Labor, 1977); *Department of Transportation, Federal Aviation Administration*, 1 FLRA No. 48 (1979). These decisions construed Section 19(a)(3) of Executive Order 11491, replaced in 1978 by enactment of the Civil Service Reform Act. A virtually identical provision appears in the latter statute, 5 U.S.C. § 7116(a)(3), and although there have been no decisions construing this provision of the Act the federal agencies in their capacities as employer have proceeded on the assumption that it will receive the same construction.

[10] States statutes providing for exclusive representation are cited at App. 65a-69a. Although the New York public sector collective bargaining statute, N.Y. Civil Service Law §§ 200 to 214, does not expressly provide for exclusive recognition (it is silent on the point), all of the recognitions that have been granted to teacher unions in that state have been exclusive.

[11] *See, e.g.*, App. 57a-58a; *Broward County School Board*, 6 FPER § 11088 (Fla. PERC, 1980); *Union County Board of Education*, 2 NJPER 50 (N.J. PERC, 1976); and cases cited *infra*, n. 12. The general rule is to accord preferential access rights to the exclusive representative only during the period that its status is insulated

exist in public employment throughout the country. Until the decision below a virtually unbroken line of federal and state cases had upheld the constitutionality of access distinctions between the exclusive representative and rival unions.[12]

That the distinction between PEA and PLEA as to access is thus "reasonable" explains why the court below found it necessary to devote the bulk of its opinion to an effort to establish that, contrary to the rule stated in *Postal Service*, "strict scrutiny" is the applicable "standard of review." (App. 13a-28a).

b. The access policy also is "content-neutral." PLEA is not denied access "merely because public officials disap-

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from challenge, and not during representation contests. *See, e.g., Federal Aviation Administration, Eastern Region, Boston ARTCC*, A/SLMR No. 273 (U.S. Dept. of Labor, 1973); *School Board of Palm Beach County*, 5 FPER 10151 (Fla. PERC, 1979); *County of Erie*, 2 NPER 33-13105 (N.Y. PERB, 1980). That is likewise the rule in Indiana, App. 4a and n. 2.

[12] As the court below acknowledged (App. 6a), its decision is in conflict with decisions of the Second and Sixth Circuits Courts of Appeals, district courts in the Third, Eighth and Tenth Circuits, and state appellate courts in New York, Florida and Nevada. *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471 (2d Cir. 1976); *Memphis American Federation of Teachers Local 2032 v. Board of Education*, 534 F.2d 699 (6th Cir. 1976). *Federation of Delaware Teachers v. De La Warr Board of Education*, 335 F.Supp. 385 (D. Del. 1971); *Teachers Local 3724 v. North St. Francis County School District*, 103 LRRM 2865 (E.D. Mo. 1979); *Local 858, American Federation of Teachers v. School District No. 1*, 314 F.Supp. 1069 (D. Colo. 1970). *Maryvale Educators Association v. Newman*, 70 A.D.2d 758, 416 N.Y.S.2d 876, *appeal denied*, 48 N.Y.2d 605, 424 N.Y.S.2d 1025 (1979); *Geiger v. Duval County School Board*, 357 So.2d 442 (Fla. App. 1978); *Clark County Classroom Teachers Association v. Clark County School District*, 91 Nev. 143, 532 P.2d 1032 (1975) (alternative holding). The only case cited by the court below as in accord with its decision is *Teachers Local 399 v. Michigan City Area Schools*, No. 72-S-94 (N.D. Ind. Jan. 24, 1973), *vacated on other grounds*, 499 F.2d 115 (7th Cir. 1974).

prove [its] view," *Postal Service*, *supra*, 49 U.S.L.W. at 4818. On the contrary, the respective views of PEA and PLEA are irrelevant to the policy adopted by the School District.[18] PEA is accorded access to the school mail facilities because the use of those facilities enables it more effectively to perform the statutory obligations imposed upon it as exclusive representative; PLEA is denied access because it does not have such obligations. The differentiating factor, in short, is not "the speaker's *view*," but rather PEA's *status* as exclusive representative and the statutory duties that accompany that status; if PLEA had been selected as the teachers' exclusive representative, the School District presumably would have given it, rather than PEA, those preferential access rights.

The court below thought that the access provisions depart from content neutrality because they are "keyed to the identity of the speaker." (App. 19a). For this conclusion the court cited decisions of this Court forbidding "speaker discrimination and impermissible subject matter restrictions" (*id.*). But the court overlooked that the decisions it cited (at App. 17a and n. 30) did not involve access to a nonpublic forum. Implicit in the concept of a nonpublic forum is the right (and in order to preserve the nonpublic character of the forum, the need) to make reasonable distinctions in access on the basis of subject matter and speaker identity—distinctions that may well be impermissible with respect to public forums. As this Court put it in *Greer v. Spock*, *supra*, 424 U.S. at 838 n.10:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that

[18] Indeed, if the unions' views *had* been a factor, PLEA likely would have been preferred, given its philosophy that teachers' personal interests should be subordinated to educational quality (JA 29-30).

> a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be *supportive of the military mission of Fort Dix* surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever. [Emphasis added].[14]

See also Madison Sch. Dist. v. Wisconsin Emp. Rel'n Comm'n, 429 U.S. 167, 175 n.8, in which this Court stated that "[p]lainly, public bodies may confine their meetings to specified subject matter and may hold non-public sessions to transact business" and cited by way of example the right of a school district to deal with the exclusive representative in nonpublic forums from which rival unions are excluded. *Id.* at 174 n.6, 175 n.8. *See also, id.* at 178 (Brennan, J., concurring).[15] In sum, the provision of access to school mail facilities—a non-public forum—to the exclusive representative, but not to rival unions, does not violate the concept of content-neutrality.

3. As we have shown, the controlling principles respecting nonpublic forums articulated in this Court's decisions

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[14] As the passage from *Greer v. Spock* quoted in text suggests, there may be circumstances in which access to a nonpublic forum can be regulated even though the determinative consideration is official disapproval of "the speaker's view." Thus, it is not self-evident that because military authorities invited a civilian to speak on the dangers of drug use they should be required to afford similar access to a civilian speaker advocating the virtues of increased drug use. Because the instant case does not involve a content-related distinction of this sort, there is no occasion here to explore the parameters of permissible content-discrimination in the provision of access to nonpublic forums.

[15] *Madison Sch. Dist.* rejected an access distinction between the exclusive representative and rival teachers to a forum—a school board meeting—that had been opened to the public generally, 429 U.S. at 174-175. In that public forum, where "any citizen" was welcome to speak, government could not select out certain teachers as the only citizens deprived of access on the basis of their opposition to the exclusive representative. *Id.* at 175; *see also, id.* at 178-179 (Brennan, J., concurring).

preclude the lower court's attempted intrusion upon the government's power to control the uses to which governmental property is put. As the access policy here in question is reasonable and content-neutral, it is wholly consistent with the Constitution.[16]

CONCLUSION

For the reasons set forth in this brief, the decision below should be reversed with directions that the district court's grant of summary judgment to defendants be affirmed.

Respectfully submitted,

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[16] We do not address, because not presented on this record, the question whether equal access for rival unions is required when an exclusive representative, having acquired access to a nonpublic forum by virtue of that status, uses the forum for purposes unrelated to its representational functions. The court below, although making clear that its holding was not dependent upon the existence of such expanded use, stated that the collective bargaining agreement "does not limit PEA's use of the mail system to messages related to its special legal duties, and hence does not exclude messages [by PEA] simply critical of PLEA" (App. 29a). That statement is without record support. On its face, the collective bargaining agreement grants PEA access "acting as the representative of the teachers" (*supra*, pp. 3-4) and there is nothing in the record to suggest that PEA *in fact* has used the school mail facilities for communications unrelated to its representational duties, whether in the form of criticism of PLEA or otherwise. The Indiana Education Employment Relations Board has expressly reserved the question whether the Indiana Statute permits "the use of school facilities . . . by an exclusive representative for purposes other than for the discharge of the exclusive representative's duties of representing the bargaining unit and its individual members" (App. 57a-58a).

Appellee's Brief

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No. 81-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION,
Appellant,

v.

PERRY LOCAL EDUCATORS' ASSOCIATION,
EVELYN E. WADDELL and JUDITH M. DIETRICH,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution is violated by a collective bargaining agreement between a public school district and an exclusive bargaining representative which grants use of the school-operated mail system to the exclusive bargaining representative while it denies use of that system to other teacher organizations, where no limitations are placed on the content or purpose of the communications transmitted therein by the bargaining representative and where the school district allows numerous other organizations and individuals routinely to use that system for purposes unrelated to school business or functions.

2. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated by a collective bargaining agreement between a public school district and an exclusive bargaining representative which grants use of the school-operated mail system to the exclusive bargaining representative while it denies use of that system to other teacher organizations, where no limitations are placed on the content or purpose of the communications transmitted therein by the bargaining representative and where the school district allows numerous other organizations and individuals routinely to use that system for purposes unrelated to school business or functions.

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JURISDICTION

This is a purported appeal from the decision by the United States Court of Appeals for the Seventh Circuit which held that a provision of the collective bargaining agreement between a majority union and a school district which granted the majority union unfettered access to school communication facilities violated the First and Fourteenth Amendments to the United States Constitution because the agreement denied equal access to another teacher organization. Appellees contend that this Court lacks jurisdiction to entertain this appeal, and the grounds for this position are found in its Motion To Dismiss Appeal or To Affirm Judgment of the United States Court of Appeals for the Seventh Circuit at 4-5.

STATEMENT OF THE CASE

The Board of Education of the Metropolitan School District of Perry Township, Marion County, Indiana [hereinafter "School Board"] operates a public school system made up of thirteen public schools in Perry Township. (JA 5) Each of the schools is equipped with a set of mailboxes or mail slots bearing the name of a teacher within the school. (JA 15) The School Board operates an internal inter-school mail system by which information in the form of letters, memoranda, official documents and other messages are sent by and to teachers. (JA 31-32; 35-36; 39-40) Prior to 1978, the School Board permitted Perry Education Association [PEA] and Perry Local Educators' Association [PLEA] among others to transmit messages through the mail system to solicit support for their respective organizations, to provide information to the employees of the School District, and to garner support for their respective points of view on issues of concern and interest to the community. (JA 31, 35, 37)

In 1977, pursuant to Indiana law,[1] PLEA filed a petition with the Indiana Education Employment Relations Board seeking to have an election to determine the exclusive bargaining representative for Perry Township teachers. During the election campaign, PEA and PLEA were denied access to the inter-school mail system and mailboxes. PEA prevailed in the election and was certified by the Board as the exclusive bargaining representative. (JA 4-5, 20; App. 2a)

Following the election, PEA, as the exclusive bargaining representative, struck a deal with the School Board by which PEA secured for itself unfettered access to the internal mail system and totally blockaded PLEA's entry into that system. (App. 3a; JA 6, 11) At the same time, the School Board continued its established practice of allowing numerous private, non-school connected individuals and organizations, such as the Cub Scouts, YMCAs, church groups and parochial schools to utilize the mail system for purposes wholly unrelated to official school or educational concerns. (JA 18-19, 35-36, 39-40).

Of equal importance to what the Record reveals is what it does *not* reveal. The Record discloses no criteria employed by the School Board to grant or deny access to the mail system. The Record is silent on whether any group other than PLEA has ever been denied permission to use the mail system, and discloses no criteria which govern the kinds of

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[1]Indiana law permits teachers and other employees to organize and to collectively bargain with school corporations over salary, wages, hours and related fringe benefits. Ind.Code Ann. §20-7.5-1-3. That bargaining and the resultant contract, however, can be entered into only between an exclusive employee bargaining representative and the employer, Ind.Code Ann. §20-7.5-1-4, and Indiana law establishes a procedure by which an exclusive representative is elected among competing unions. Ind.Code Ann. §20-7.5-1-10. This litigation does not concern that statutory procedure nor the application of that statutory scheme to the 1978 election by which PEA became the exclusive representative of the Perry Township teachers.

expression (e.g. political, civic, religious, personal, etc.) which are allowed to pass through the system. All that is required of groups other than PLEA to gain access to the system is receipt of prior approval from the individual building principal.

Further, contrary to PEA's repeated contentions in their Brief, there is no evidence to support the allegations that the School Board granted PEA use of the mail system "to fulfill its statutory obligations to represent the teachers." *See*, PEA Brief at 11, 12, 13 and 17. Equally so, the Record does not demonstrate that PEA's use of the system was confined to exercising its representational duties. Nor does the Record disclose that PLEA's use of the mail system would interfere with or hinder PEA's fulfillment of its duty to discharge its representational functions. Finally, there is no evidence of any labor disharmony which resulted from PLEA's previous use of the mail system or that the School Board had any reason to believe that labor disharmony would result from PLEA's continued use of the system.

SUMMARY OF THE ARGUMENT

The First Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, proscribes the abridgement of the right of free speech by state and local government. Consistent with this principle, when a governmental unit opens a public facility for use as a forum for speech to some groups, it may not close that forum to others on the basis of the content of the speech to be communicated therein or because of the identity of the speaker, absent a compelling reason to do so and a showing that the restriction is the least restrictive means to accomplish the state's interest.

The differential access policy enforced by the School Board violates these principles. The School Board, having chosen to grant the majority union, as well as numerous other non-school connected groups, access to the internal

mail system, is constitutionally prohibited from excluding another teacher organization from access on an equal basis, without a showing of a compelling need to do so. In the courts below, the School Board and the majority union attempted to justify the unequal treatment on two grounds. First, it was argued that the exclusive access policy was necessary to facilitate performance by the majority union of its obligation to represent the teachers. However, as the court of appeals found, there was no showing that the restriction enforced by the School Board was logically or factually connected to serving this interest, since there had never been any interference in the majority's efforts to represent the teachers and since the majority union was granted free access to the system to communicate any and all messages, only some of which pertained to its representational functions.

Second, it was argued that the exclusive access policy was necessary to assure labor harmony. However, there is no evidence in the Record (because none exists) to indicate the presence of any labor disharmony or even to suggest that labor disharmony would result from granting another teacher organization equal access to the mail system. As such, the differential access policy does not constitute a reasonable time, place or manner restriction on access to a forum generally open to a variety of groups. Further, the restriction is unnecessary to serve the purported state interest in facilitating the bargaining representative's responsibility to represent its constituents or to preserve labor harmony. Consequently, the collective bargaining agreement differential access provision is violative of both the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

A.

THE COLLECTIVE BARGAINING AGREEMENT VIOLATES PLEA'S RIGHTS SECURED BY THE FIRST AMENDMENT BECAUSE IT DENIES PLEA ACCESS TO AND USE OF THE INTERNAL MAIL SYSTEM ON THE BASIS OF THE IDENTITY OF THE SPEAKER AND THE CONTENT OF THE SPEECH TO BE COMMUNICATED.

1. The First Amendment is applicable to public school labor relations and to access to public school facilities.

The point of departure for an analysis of this Constitutional issue is the language of the First Amendment, which provides, in pertinent part, that: "Congress shall make no law...abridging the freedom of speech...." This First Amendment freedom is protected by the Fourteenth Amendment from invasion by the States[2] and its protections have long been held to be available to teachers and students when applied in light of the special characteristics of the school environment. As this Court declared in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969): "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Accord: Healy v. James*, 408 U.S. 169 (1972). Consistent with this principle, the First Amendment has been applied to a wide variety of public school labor practices. For example, the government may not force teachers to contribute to efforts

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[2]*Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Douglas v. City of Jeanette*, 319 U.S. 157 (1943); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939).

by their bargaining representative to advocate political positions[3]; it may not prohibit teachers from speaking out at open school board meetings[4]; nor fire teachers because they publicly criticize the government[5]; and it may not forbid its employees to join a union[6]. Of course, "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 568 (1968). This difference justifies the imposition of restraints so long as those restraints are supportive of a compelling state interest and are "finely tailored to serve" that interest. *Carey v. Brown*, 447 U.S. 455, 461-462 (1980). In the context of public schools this interest has been defined to be the avoidance of conduct which would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'...." *Tinker v. Des Moines Independent School District, supra*, 391 U.S. at 509. Thus, any restrictions against the free exercise of speech within a school system must be carefully scrutinized in light of this interest. *Carey v. Brown, supra*, 447 U.S. at 461-462.

2. That the internal mail system is not a public forum in the traditional sense does not end the constitutional analysis where use of a forum generally open to groups and individuals is compatible with the purpose for which the forum was established.

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[3] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[4] *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968).

[5] *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

[6] *Hanover Township Federation of Teachers Local 1954 v. Hanover Comunity School Corp.*, 457 F.2d 456 (7th Cir. 1969) (Stevens, J.)

PEA argues that the internal mail system is not a public forum and, in consequence, that the School Board need not grant equal access to comply with the dictates of the First Amendment. PEA Brief at 12-13. Reliance for this position is exclusively based upon *United States Postal Service v. Council of Greenburgh Civil Association*, ___ U.S. ___, 101 S.Ct. 2676 (1981) (hereinafter referred to as *Postal Service*).

PLEA acknowledges that the internal mail system is not a "public forum"[7] in the same sense as are streets, parks and town halls. *Hague v. CIO*, 307 U.S. 496 (1939)[8]; *Schneider v. State of New Jersey, supra; Cantwell v. Connecticut, supra.* However, this does not end the analysis. Having decided that the forum is unlike places to which persons traditionally have been granted access, it must be determined "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116-117 (1972). Facilities which have been incorporated into the public forum doctrine via the "compatibility" analysis include public transportation

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[7]The term "public forum" apparently finds its roots in the seminal article authored by Harry Kalven entitled *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Supreme Court Review 1, 11-12, wherein he states:

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and emphathy with which such facilities are made available is an index of freedom....

[8]Unlike schools: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens". *Hague v. CIO, supra*, 307 U.S. at 515.

terminals and vehicles[9], public schools[10], public school newspapers[11], municipal theatres[12], and a wide variety of other public buildings.[13] On the other hand, the compatibility test has been used to deny access to public forums where the speech is incompatible with the purpose for which the facility was dedicated.[14]

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[9]*See, e.g., Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.) (airport), *cert. denied*, 421 U.S. 992 (1975); *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir.) (bus terminals), *cert. denied*, 393 U.S. 940 (1968); *Moskowitz v. Cullman*, 432 F.Supp. 1263 (D.N.J. 1977) (bus and train terminals); *International Soc'y for Krishna Consciousness, Inc. v. Engelhardt*, 425 F.Supp. 176 (W.D.Mo. 1977) (airport); *Stoner v. Thompson*, 377 F.Supp. 585 (MD. Ga. 1974) (public bus); *Kissinger v. New York City Transit Auth.*, 274 F.Supp. 438 (S.D.N.Y. 1967) (subway); *Wirta v. Alameda Contra-Costa Transit Dist.*, 68 Cal.2d 51, 434 P.2d 982, 64 Cal.Rptr. 430 (1967) (railroad terminal); *Hillside Community Church, Inc. v. City of Tacoma*, 76 Wash.2d 63, 455 P.2d 350 (1969) (public transit system).

[10]*See Tinker v. Des Moines Independent Community School Dist., supra* (holding that the wearing of black armbands in protest of the Vietnam War by children in public schools is protected by the First and Fourteenth Amendments). The *Tinker* decision indicates that public schools are subject to the public forum right of access, at least with respect to students who attend the school. *See generally* Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 Calif.L.Rev. 132 (1966).

[11]*See Lee v. Board of Regents of State Colleges*, 441 F.2d 1257 (7th Cir. 1971); *Gambino v. Fairfax County School Bd.*, 429 F.Supp. 731 (E.D.Va. 1977), *aff'd*, 564 F.2d 157 (4th Cir. 1977); *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969)

[12]*See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

[13]*Flower v. United States*, 407 U.S. 197 (1972) (per curiam) (military reservation); *Edwards v. South Carolina, supra* (State House grounds); *Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319 (2d Cir.) (welfare office), *cert. denied*, 419 U.S. 838 (1974); *United States Servicemen's Fund v. Shands*, 440 F.2d 44 (4th Cir. 1971) (public auditoriums); *Toward a Gayer Bicentennial Comm'n v. Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976) (Old State House); *Reilly v. Noel*, 384 F.Supp. 741 (D.R.I. 1974) (State Capital).

[14]*See, e.g. Adderley v. Florida*, 385 U.S. 39 (1966) (jail premises); *Brown v. Louisiana*, 383 U.S. 131 (1966) (public library); *Greer v. Spock*, 424 U.S. 828 (1976) (military base) (Powell, J. concurring); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977) (soliciation of prisoners to join prisoners' union held to be incompatible with "reasonable considerations of penal management.")

The Perry Township schools obviously were created to educate children, and the School Board could have restricted access to its buildings and other facilities for this sole purpose. However, it chose to do more, opening its communication channels to a variety of groups and individuals to transmit messages of political, social, and personal concern, many of which were wholly unrelated to school business. The Record does not disclose why this access was granted both to PLEA and PEA at one time. But the Record does show that this use of the mail system in no way interfered with the order or discipline of the schools or undermined the mission of educating pupils. However, once PEA came to power by virtue of a representational election, PEA bargained for and secured for itself unrestricted access to the system and bargained for and secured a total denial of PLEA's right of access. PEA would have this Court believe that this policy was developed in order to facilitate PEA's performance of its representational duties, and, in consequence, its use of the mail system was placed on a higher rung of compatibility than that occupied by PLEA. Aside from the fact that there is no support in the Record for this bald contention, PEA's argument wholly fails to justify or accommodate for the fact that the Cub Scouts, YMCAs, church groups, parochial schools and assorted others continued to be granted access. It is no accident that the exclusion of PLEA sprang forth from a collective bargaining agreement negotiated for and signed by PEA.

But that agreement did nothing to alter the fact that the use of the system by PLEA was compatible with the purpose for which the forum was created—the dissemination of information to teachers. Hence, the agreement did not transform the mails into a private forum whereby selective exclusion would avoid First Amendment analysis.

Moreover, it is axiomatic that where the State, through its political subdivisions, school boards or other agencies, creates and opens a forum for speech and then

discriminates between the speakers for whom access to the forum is granted or differentiates between the content of speech allowed to be transmitted in the forum, it must demonstrate a compelling state interest to justify the discrimination. This principle was reiterated and emphasized in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), where the Court declared:

> [A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. [citations omitted]
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> * * *
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> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas" and the government must afford all points of view an equal opportunity to be heard. *Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.*

Id., 408 U.S. at 95-96. (Emphasis added) (footnote omitted).

This principle was recently reaffirmed in *Widmar v. Vincent*, ____ U.S. ____, 102 S.Ct. 269 (1981) where the Court confronted the question of whether a state university could exclude one student group from a forum which was generally open to other student groups merely because its speech was religious. The university defended its action on the basis that a grant of access to the forum to religious groups would violate the Establishment Clause. In turning aside this asserted state interest, the Court declared:

> Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.

Id., 101 S.Ct. at 273. Later, the Court concluded that the discriminatory access policy could be justified only by showing that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.*, 101 S.Ct. at 274. (citing *Carey v. Brown, supra*).

Examination of the justifications asserted to support the exclusion of PLEA from the inter-school mail system reveals that the exclusion is neither necessary nor narrowly drawn to achieve an important state interest. PEA asserts that the discriminatory access policy is necessary to enable it to carry out its representational duties. Nothing in the Record, however, supports that assertion. While PEA and PLEA were granted equal access to that forum there was no interference with the transmittal or receipt of any communication. Moreover, as the court of appeals found, nothing in the Record demonstrates that the exclusive access policy was adopted solely because of PEA's status as exclusive bargaining representative or that PEA was granted permission to utilize the mail system solely to perform its role as exclusive bargaining representative of the Perry Township teachers. Indeed, nothing in the Record indicates that this was the only use made of the mail system by PEA following the 1978 election. And finally, the overriding state interest served by the public schools—the education of children—was never placed in jeopardy by PEA and PLEA's mutual use of the mail system. Indeed, given PLEA's central purpose of avoiding strife amongst

teachers and discouraging interruption of the educational process for any reason, it is reasonable to project that had disruption been fomented by its use of the mail system, PLEA would have ceased utilizing that forum. In any event there is no evidence that the discriminatory policy was based upon "reasonable inferences drawn from concrete facts...that disturbances or interferences with appropriate discipline [would] occur." *Healy v. James, supra* at 189. *See also, Tinker v. Des Moines Independent Community School District, supra,* 393 U.S. at 508-509; *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 94-95 (1977) (record failed to demonstrate that the ban on "For Sale" signs on front lawns was needed to assure that the city would remain integrated).

In face of this, PEA steadfastly contends that the mail system in the Perry Township Schools is a private forum and that the First Amendment does not apply. Gasping for breath in a constitutional vacuum, PEA desperately relies upon *Postal Service* for resuscitation. However, *Postal Service* is factually and legally distinguishable in important, indeed controlling respects. There, the Postal Service restricted all persons from delivering letters to individuals' private mailboxes and granted no exemptions from this rule to any individual or group based upon either the content of their messages, their identity or their "status." To the contrary, in the instant case, the School Board has adopted no uniform rule respecting access to its mail system. It grants PEA unrestricted access and allows other, non-school connected persons access on request. Only PLEA has been excluded. Had the Postal Service employed such a rule, that rule would have been strictly scrutinized. "To be sure, if a governmental regulation is based on the content of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapproved the speakers' view.' [Citation omitted]. But in this case there simply is no question that §1725 does not

regulate speech on the basis of content." *Id.*, 101 S.Ct. at 2686. Here, on the other hand, there can be little question as to whether the differential access policy is based upon the content of messages sought to be communicated in the forum[15]. And there is no question that the policy is based upon the identity of the speaker, a factor not present in *Postal Service*.

Second, the Court in *Postal Service* found no historical support for the proposition that individuals' mailboxes were other than private forums. This is not so in this case. As noted at page 8, *supra*, public schools, public school newspapers and, indeed, public school communication facilities have been declared public or quasi-public forums. For example, in *Tinker v. Des Moines Independent Community School District*, *supra*, the Court did not find the public school to be a public forum in the sense of the streets and parks, but held that the school could not prohibit political speech which did not "materially and substantially interfere with the requirements of appropriate discipline in the schools." *Id.*, 393 U.S. at 509. *Accord: Widmar v. Vincent*, *supra*, 102 S.Ct. at 273; *Southeastern Promotions, Ltd. v. Conrad*, *supra*; *Healy v. James*, *supra*. Indeed, lower courts have held that internal communication systems similar to those found in the Perry Township schools become public forums when they are opened by the school administration as a medium of discussing political issues. *Bonner-Lyons v. School Committee of City of Boston*, 480 F.2d 442 (1st Cir. 1973); *University of Missouri v. Dalton*, 456 F.Supp. 985 (W.D.Mo. 1978); *see also National Socialist White People's*

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[15]The court of appeals concluded that there was no question that the restriction was viewpoint based. "The access policy adopted by the Perry schools, in form a speaker restriction, favors a particular viewpoint on labor relations in the Perry schools...: the teachers inevitably will receive from PEA self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by the PLEA." App. at 20a.

Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (auditorium which is furnished to one group may not be denied to another on similar terms without violating First Amendment); *Gay Students Organization of University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974). Consequently, even if not a classic public forum, once a public school grants use of its communication facilities to one group, it may not close those facilities to others absent a showing that the discrimination serves the compelling state interest in preserving a peaceful educational environment.

Whatever the term used to describe those facilities, however, PEA's argument wholly fails to answer the *Tinker*, *Healy* and *Grayned* principle that speech within public schools may be restricted only upon a showing that it will materially and substantially interfere with appropriate discipline in the operation of the schools or undermine the educational opportunities of its pupils. Equally so, application of the wooden definition of public forum urged by PEA violates the *Mosley* and *Widmar* doctrine that discrimination between speech within a public school environment may not be based upon content and that public facilities opened for speech may not be closed based on the identity of the speaker. Consequently, PEA's pronouncement that the mail system is not a public forum and thus is not subject to First Amendment analysis is supported neither by the facts of this case nor by controlling principles of constitutional law.

3. The collective bargaining agreement does not establish reasonable time, place and manner restrictions on use of the mail system but instead grants access to that system on the basis of the subject matter of the speech to be communicated.

A strict application of the *Mosley* doctrine would seem to prohibit the state from restricting or regulating access to

forums opened to assembly or speech. However, this Court has often ruled that reasonable time, place and manner regulations which serve significant governmental interests do not offend the First Amendment. *See, e.g. Kovacs v. Cooper*, 336 U.S. 77 (1949); *Adderley v. Florida, supra; Grayned v. City of Rockford, supra; Lin.nark Associates, Inc. v. Township of Willingboro, supra; Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion). In *Cox v. New Hampshire*, 312 U.S. 569 (1941), this Court upheld a licensing requirement for parades through public streets. The Court recognized that the regulation, which was based on time, place or manner criteria, served the municipality's interests in regulating traffic, securing public order and in ensuring that simultaneous parades did not clash with one another. *Id.*, 312 U.S. at 576. Similarly, in *Grayned v. City of Rockford, supra*, the Court upheld an anti-noise ordinance which prohibited demonstrations which would disturb the good order of a school building. The Court found that the restriction advanced the city's interest in having "an undisrupted school session conducive to students' learning..." *Id.*, 408 U.S. at 119. "Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison Co. v. Public Service Commission*, ___ U.S. ___, 100 S.Ct. 2326, 2332 (1980).

Time, place or manner restrictions are constitutional, however, only so long as they are reasonable. They are *per se* unreasonable when they are directed to a particular speaker or at the particular content of speech.

> [W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267, 280 (1951) (Frankfurter, J., concurring in the result). As a

> consequence, we have emphasized that time, place and manner regulations must be "applicable to all speech irrespective of content." *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); see *Carey v. Brown*, ____ U.S. ____ at ____, 100 S.Ct. 2286 at 2295-2296, 64 L.Ed.2d ____ (1980). Governmental action that regulates speech on the basis of its subject matter "'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" *Police Department v. Mosley*, 408 U.S. 92, 99, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212 (1972) quoting Kalven, The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Sup.Ct.Rev. 29. Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.

Consolidated Edison Co. v. Public Service Commission, *supra*, 100 S.Ct. at 2332. *Accord: Widmar v. Vincent*, *supra*.

That a regulation which excludes one group, organization or individual from a forum of speech is "content" or subject matter based is unquestionable, particularly where the State discriminates between speakers who are granted and denied such access. *Police Department of Chicago v. Mosley*, *supra*, 408 U.S. at 96. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), for example, this Court struck down a Massachusetts statute which forbad corporations from making expenditures to influence the outcome of a vote on any question submitted to voters other than those which materially affected the property, business or assets of the corporation. In the course of its opinion, the Court directly confronted the equal access question and held that the statute was violative of the Free Speech Clause of the First Amendment.

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the

> speakers who may address a public issue. *Police Depart. of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972) * * * Especially where...the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

Id., 435 U.S. at 784-785 [footnote omitted]. The Court went on to declare:

> We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..." *Buckley*, 424 U.S. at 48-49, 96 S.Ct. at 649. Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.

Id., 435 U.S. at 790-791. *Accord: City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976).

As noted above, PEA is the sole employee organization which has been granted access to the mail system. Its use of that system, moreover, has not been limited in terms of the content of the messages it transmits or the extent to which it may utilize the system. It has secured for itself unfettered and unlimited access to the most effective, cost-efficient means by which to "speak" to the teachers in Perry Township. Aside from the purely personal or social messages it has sent through the mails, it has also transmitted communication that can fairly be termed political.[16] To grant PEA such access while denying it to

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[16] *Abood v. Detroit Board of Education, supra*, recognized "the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political." PEA does not, and based on the Record, cannot deny that it has used the mail system for purposes other than to discharge its representational duties. 431 U.S. at 231.

PLEA, therefore, is tantamount to granting access to a forum to the Republican Party because it is in power and denying that same forum to the Democratic Party. This discrimination undermines fundamental precepts of the First Amendment: the encouragement of robust and open exchange of political, cultural and social ideas and the denial to the government of the right to assume the task of ultimate judgment on what the people may hear. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *First National Bank of Boston v. Bellotti, supra; Linmark Associates, Inc. v. Township of Willingboro; supra; Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of... the First Amendment freedoms); Meiklejohn, *The First Amendment Is Absolute*, 1961 Sup.Ct.Rev. 245, 263; Meiklejohn, *Free Speech And Its Relation To Self Government* 26 (1948) ("Citizens... may not be barred [from speaking] because their views are thought to be false or dangerous... and the reason for this equality in the status of ideas lies deep in the very foundations of the self-governing process. When [people] govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger.") Consequently, the differential access policy embodied by the collective bargaining agreement manifestly offends the First Amendment and must be eviscerated.

4. The differential access policy found in the collective bargaining agreement does not constitute a valid subject matter ban on speech in the public schools.

Just as it is true that government may impose time, place and manner restrictions on access to a forum, it is equally true that government may restrict certain subject matter from discussion in certain forum. Thus, the Court has held that political speech may be excluded from a military base because political speech is inimical to the military mission. *Greer v. Spock*, 424 U.S. 828 (1976). *Brown v. Glines*, ___ U.S. ___, 100 S.Ct. 594, 599 (1980) ("Speech likely to

interfere with...vital prerequisites for military effectiveness therefore can be excluded from a military base.") *Parker v. Levy*, 417 U.S. 733, 743 (1974). ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. * * * The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' [citation omitted] * * * Speech that is protected in the civilian population may undermine the effectiveness of response to command.") Equally, this Court, by plurality, concluded that a city transit system that rented space in its vehicle for commercial advertising was not required to offer space for partisan political advertising. The effect of the restriction, however, was not to favor or disfavor a particular point of view and the Court concluded that the city could restrict access in order to protect the captive audience. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). But, as the Court later explained:

> *Greer* and *Lehman* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. * * * The plurality in *Lehman* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

Consolidated Edison Co. v. Public Service Commission, *supra*, 100 S.Ct. at 2334. Thus, both *Greer* and *Lehman* stand for the proposition that the government may choose to allow only certain subjects to be aired in a public facility without offending the Free Speech Clause of the First Amendment. In both *Greer* and *Lehman* the restrictions imposed had no readily discernible tendency to favor particular viewpoints or doctrines. Thus, unlike *Mosley* and *Carey*, which involved ordinances which banned all but labor picketing in certain areas, the *Greer* and *Lehman*

restrictions were subject matter neutral. As the court of appeals stated in reconciling these two lines of cases:

> Viewpoint-neutrality...helps explain why restrictions keyed to the identity of the speaker are always scrutinized strictly: they almost invariably are not neutral with respect to the viewpoints they tend to disfavor.

App. 19a.

In the instant case, the School Board has permitted political and non-political speech to circulate in the mail system. Of all groups which had previously been granted access, only PLEA has ever been excluded. Thus, unlike *Greer* and *Lehman*, the only discrimination practiced here is that between speakers; there is no discrimination between the subject matter of the speech allowed and the speech prevented from being exchanged within the mail system. This speaker-based discrimination cannot survive the close scrutiny which the First Amendment mandates.

5. The means chosen to achieve the state interests in promoting labor harmony and facilitating the majority union's duty to represent the teachers is not finely tailored to serve those interests.

The court of appeals examined the justifications asserted by PEA and the School Board to support the differential access policy and found them wanting. App. at 28c-31a. In the court of appeals, PEA contended that exclusive use of the mail system was justified by its role as exclusive bargaining agent for all Perry Township teachers. Additionally, PEA suggested that the exclusive access policy was justified by the state's interest in promoting labor harmony.[17]

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[17]Significantly, PEA has abandoned this asserted justification for the access policy in this Court. Presumably this justification was deleted because, as the court of appeals found, there was no evidence of labor disharmony within the school system; nor is there any inference that could be drawn from concrete facts that labor disharmony would result from continued use of the system by PLEA. *Healy v. James, supra; Tinker v. Des Moines Independent School District; supra.*

With respect to the first justification, (the only one relied upon by PEA in this Court), the restriction of PLEA's access to the mail system serves no state interest and is both overinclusive and underinclusive. As the court of appeals cogently explained:

> That PEA has legal duties to the teachers that PLEA does not have does not justify the exclusive access policy. The access policy in force is both overinclusive and underinclusive with respect to the asserted justification: overinclusive because the collective bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties, and hence does not exclude messages simply critical of PLEA; underinclusive, because the school district permits outside organizations with no special duties to the teachers to use the system.

App. 29a. Therefore, to argue, as PEA does in its Brief, that the exclusive access policy was designed because of PEA's status as exclusive bargaining representative merely begs the constitutional question. Aside from the fact that no evidence supports this asserted justification, PLEA does not argue that the School Board has no reason to grant PEA access but, rather, that it has no reason to make its right of access *exclusive*. "Without an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." *Id.*

B.

THE DIFFERENTIAL ACCESS POLICY IS ALSO VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973), established what has commonly been referred to as the two-tier analysis of equal protection

claims brought under the Fourteenth Amendment: government classifications that infringe on fundamental rights and classifications along suspect lines must be closely tailored to meet a compelling state interest, but other classifications need only be rationally related to a legitimate state interest. As the court below found, the analysis under the First and Fourteenth Amendment is virtually identical where the right of free speech is implicated.

> Because free speech is a fundamental right, and because discrimination between speech or speakers, to the extent that it operates as a forum of censorship, implicates that right, the fundamental rights strand or strict scrutiny applies to such discrimination. The particular identity of equal protection and first amendment analyses in differential access cases follows logically from the explicit constitutional designation of speech as fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee.

App. at 20a-21a. Indeed, this Court has often analyzed free speech and forum-access issues under the Equal Protection Clause as opposed to the First Amendment. The most notable example is *Police Department of Chicago v. Mosley, supra*, where the Court, speaking through Justice Marshall, determined that the Chicago picketing ordinance violated equal protection because it described permissible picketing in terms of its subject matter:

> Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely interwined with the First Amendment interests; [footnote omitted] the Chicago ordinance affects picketing, which is expressive conduct;

> moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. [citations omitted].

Id., 408 U.S. at 94-95. The Court then intersected the First and Fourteenth Amendment claims by concluding:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. * * * Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id., 408 U.S. at 96.

This principle also formed the basis for the Court's reversal of convictions for breach of the peace in *Brown v. Louisiana*, *supra* at 143 (1966), where the plurality declared:

> A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. *But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all. It may not do so as to some and not as to all.* It may not provide certain facilities for whites and others for Negroes. And it may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights. (emphasis added)

Accord: Niemotko v. Maryland, 340 U.S. 268 (1951) (refusal to permit Jehovah's witnesses to use municipal parks when other religious groups were allowed to use park violated First and Fourteenth Amendments); *Fowler v. Rhode*

Island, 345 U.S. 67 (1953); *Cox v. Louisiana*, 374 U.S. 536, 581 (1965) (Black, J. concurring); *Bonner-Lyons v. School Committee, supra; United States Servicemen's Fund v. Shands, supra* at 46 ("It is much too late in the history of the First Amendment to seriously suggest that public officials managing a public facility may pick and choose the philosophical and ideological content of programs using public auditoriums."); *Byrum v. Schiro*, 219 F.Supp. 204, 210 (E.D.La. 1963) *aff'd*, 375 U.S. 395 (1964) ("A municipality cannot deny the use of a public building to one organization while 'permission is freely granted to others...for the purpose of public assembly and discussion'"); *Indiana Civil Liberties Union v. Indiana War Memorial Commission*, 160 Ind. 36, 291 N.E.2d 888 (1973), *cert. den.* 414 U.S. 859 (1974) (organization may not be denied use of public building for meeting if meeting is not inconsistent with purpose for which building was established without violating equal protection); *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 171 P.2d 885 (1946) (where state law dedicated every public school building and grounds as "civic centers" for discussions and meetings, conditioning access on the signing of an affidavit which disavowed any affiliation with any group advocating overthrow of the government was a violation of equal protection); *Madole v. Barnes*, 20 N.Y.2d 169, 282 N.Y.S.2d 225, 229 N.E.2d 20 (1967); *East Meadows Community Concerts Ass's v. Board of Education*, 18 N.Y.2d 129, 272 N.Y.S.2d 341, 219 N.E.2d 172 (1966) (state is not under a duty to make school buildings available for public gatherings, but if it elects to do so, it is required by the Equal Protection Clause of the Fourteenth Amendment to grant use of such facilities on an equal, nondiscriminatory basis) *Buckley v. Meng*, 35 Misc.2d 467, 230 N.Y.S.2d 924 (Sup.Ct. 1962).

It is clear that the collective bargaining provision challenged herein creates two classes of persons and grants a special right of access to communication facilities to one

(PEA and unspecified others) while it denies access to the second (PLEA). While the mail system is not a classic public forum, once the School Board chose to open that forum to PEA and numerous other groups and individuals it was required to grant equal access to PLEA or contend with the Equal Protection Clause of the Fourteenth Amendment. Given the admitted infringement of the fundamental right of free speech, the School Board, in deciding to exclude PLEA from the mail system, was required to justify that decision by demonstrating that it furthered a compelling state interest and that the means chosen to accomplish that interest were necessary. As was shown in the context of the First Amendment analysis, the School Board wholly failed to meet its burden. See pages 5-20, *supra*. Hence, the rationale for the regulation is fatally impeached since clearly it is not "keyed to interferences with other uses" of the forum "but appear[s] to implicate the kind of message that the groups were transmitting. The regulation...thus slip[s] from the neutrality of time, place, and circumstances into a concern about content." Kalven, *The Concept of the Pubic Forum: Cox v. Louisiana*, *supra* at 29. As such, the differential access policy denies PLEA's rights to equal protection of the laws and seeks to enforce the asserted state interest by means which venture well beyond less restrictive but equally effective alternatives available to the School Board.[18]

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[18]For example, the School Board could have adopted reasonable time, place, and manner restrictions which limited the quality, quantity, or subject matter of material passing through the system. Or it could have conditioned use of the system on the preservation of labor harmony. Or it could have prohibited the use of the system by a group which had engaged in disruptive conduct.

CONCLUSION

For the foregoing reasons, this Court should dismiss this purported appeal for lack of appellate jurisdiction. In the alternative, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 81-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION,
Appellant,

v.

PERRY LOCAL EDUCATORS' ASSOCIATION,
EVELYN E. WADDELL and JUDITH M. DIETRICH,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR APPELLANT

ARGUMENT

In the first section of this brief we respond to appellees' contention that this appeal is not properly brought under 28 U.S.C. § 1254(2).[1] In Section II we respond to certain arguments advanced by appellees in regard to the merits of this case. Finally, in Section III, we respond to the comments made by the United States Postal Service in its memorandum as amicus curiae *vis-a-vis* the relationship between the Private Express statutes, 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606, and the issues that are before the Court.

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[1] This Court, by Order dated January 11, 1982, ruled that:

> Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. [50 U.S.L.W. 3547.]

I. THIS COURT HAS JURISDICTION OF THIS APPEAL PURSUANT TO 28 U.S.C. § 1254(2)

In our Jurisdictional Statement, we discussed the decisions of this Court which indicate that the collective bargaining agreement provisions in question constitute a "state statute" for purposes of 28 U.S.C. § 1254(2). Pp. 2-3, n.1. Appellees do not quarrel with our reading of these cases, nor do they cite any cases to the contrary. Their argument is based instead on the alleged consequences of our position—specifically, they assert that it calls for "an infinite expansion of this Court's appellate jurisdiction" which would result in "a deluge of appeals . . . ." Appellees' Motion to Dismiss Appeal or to Affirm Judgment at 5. Appellees misstate our position and, in turn, misconceive its consequences.

Contrary to appellees' contention, it is not our position that "every [authorized] act of a state agency" or every provision of a public sector collective bargaining contract constitutes a "state statute" for purposes of this Court's appellate jurisdiction. *Id.* We seek rather to invoke the settled principle that where a governmental body exercising authority granted by the state adopts "rules having continuing force and intended to be observed and applied in the future," such rules "are in essence legislative acts of the State" and, therefore, "state statutes" under 28 U.S.C. § 1254(2). *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100, 104 (1928); *see also, Lathrop v. Donohue*, 367 U.S. 820, 824-825 (1965) (plurality opinion).[2] The access policy here at issue plainly meets this test and appellees do not contend otherwise.

Nor is there anything in this Court's decisions to suggest that its appellate jurisdiction somehow is dependent upon whether the policy is adopted unilaterally by the

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[2] It is immaterial for purposes of this Court's jurisdiction that the rules in question were adopted by a municipal body rather than by the state legislature. *City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976); *Lathrop v. Donohue, supra*, 367 U.S. at 824-825 and cases cited therein.

government agency as opposed to being embodied in a collective bargaining agreement. To the contrary, a provision in a collective bargaining agreement "has the same force as if the school board had adopted it by promulgating a regulation." [3]

Appellees' concern that "the ever increasing occurrence of public sector collective bargaining [with] the opportunities for constitutional challenge to contractual provisions . . .." could cause "an infinite expansion of this court's appellate jurisdiction . . .", Motion to Dismiss Appeal or Affirm Judgment at 5, is unfounded. Since we contend only that school district rules developed through collective bargaining are subject to this Court's review on the same basis as rules promulgated unilaterally by the school district, appellees' contention necessarily assumes that collective bargaining expands the number of policies affecting the salaries, hours and working conditions of public employees. This is incorrect. The purpose of collective bargaining is not so much to produce an expansion in the number of such policies, as it is to provide a vehicle for bilateral union/employer formulation of policies that otherwise would be promulgated unilaterally by the employer.[4]

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[3] *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 253 (1977) (Powell, J., concurring in judgment). *See also, id.* at 228-229 (Opinion of the Court.)

Where "rules having continuing force and intended to be observed and applied in the future" are adopted pursuant to state authority, for jurisdictional purposes it does not "matter what . . . form" the rules may take. *King Mfg. Co., supra*, 277 U.S. at 104. *See, e.g., Illinois ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (sustaining appellate jurisdiction in a case involving a school board practice concerning religious instruction, which was not embodied in any formal rule or order but was followed by the board in the exercise of its "general supervisory powers over the use of the public school buildings." *Id.* at 205).

[4] To the extent appellees are suggesting that appellant's construction of 28 U.S.C. § 1254(2) will force this Court to decide cases that do not involve issues of importance, they simply repeat the complaint

II. THE SCHOOL MAIL FACILITIES ARE A NON-PUBLIC FORUM AND, JUDGED BY THE STANDARD APPLICABLE TO SUCH A FORUM, THE ACCESS POLICY IN QUESTION IS WHOLLY CONSISTENT WITH THE CONSTITUTION

In order to frame the issues presented by this case, it is helpful to begin by setting forth two constitutional principles that are not in dispute. Appellees assert, and we agree, that access to *public forums* may be subjected only to reasonable time, place, and manner regulations, which are content-neutral and appropriately tailored to serve a significant governmental interest. Appellees' Brief at 9-12; 14-21. *See, U.S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 535-536 (1980). Appellees, on the other hand, do not dispute our assertion that governmental decisions respecting access to *non-public forums* are constitutional if reasonable and viewpoint-neutral.[5] Appellant's Brief at 9. *See, U.S. Postal Service*,

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that was made in dissent when this Court first articulated the now-settled principle that municipal ordinances are "state statutes" for jurisdictional purposes. *King Mfg. Co., supra*, 277 U.S. at 115, 129 (Brandeis, J., dissenting). But this Court has rejected this as a reason for constricting its statutorily-defined jurisdiction. *See, e.g., Jamison v. Texas*, 318 U.S. 413, 414 (1943) (declining to reconsider the rule of *King Mfg. Co.*). The fact is that "many statutes affect far fewer people, and involve far less compelling interests" than municipal policies such as the one at issue in this case. 16 C. Wright, A. Miller, E. Cooper and E. Gressman, *Federal Practice and Procedure*, § 4012, pp. 606-607 (1977). Moreover, since cases of this type are reviewed by this Court only when they present a substantial federal question, there is in any event no basis for appellees' fear that this Court will be constrained to hear trivial cases.

[5] This Court's statement in *U.S. Postal Service*, at 132, that access to a non-public forum may not be regulated "on the basis of content", appears in context to refer to "view-point neutrality" rather than "content-neutrality", as the latter phrase is used in judging the validity of an access policy to a public forum. As is

supra, at 132. In short, the parties do not disagree as to the standards to be applied in judging the constitutionality of access restrictions to public and non-public forums.[6] The disagreement centers rather on the standard that is applicable here—phrased otherwise, are the school mail facilities a public or non-public forum?

With regard to this disagreement, there are again certain principles that the parties agree upon. As appellees "acknowledge," the school mail facilities are "not a 'public forum' [footnote omitted] in the same sense as are streets, parks and town halls." Appellees' Brief at 7. Nor is there any serious quarrel with the proposition that such facilities do not necessarily become a public forum merely because they are made available for use by *some* outside groups. Thus, appellees concede that the school mail facilities would not lose their non-public character if access were restricted to groups that are engaged in activity related to school business. (*See*, Appellees' Brief at 9, and specifically, "The Perry Township schools obviously were created to educate children, and the School Board could have restricted access to its buildings and other facilities for this sole purpose.")

The crucial question is whether, as appellees put it, the school district "chose to do more", *id.*, so that the access policy must be examined in the context of a time, place, and manner regulation on the use of a public forum.

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evident from the analysis in *U.S. Postal Service*, the quoted statement was designed to indicate that access to a non-public forum may not be prohibited " 'merely because public officials disapprove the speaker's view.' " *Id.* In order to reflect this focus, the phrase "view-point neutral" is used in text, although the distinction between view-point and content neutrality has no bearing on the outcome of this case. *See*, Appellant's opening Brief at 16-18.

[6] The court below failed properly to distinguish between the two standards. Thus, after holding that the school mail facilities are a *non-public forum*, it imposed a requirement of "equal access" subject only to time, place, and manner regulations, which is the standard applicable to a *public forum*.

Recognizing that an exclusive representative "has legal duties . . . which require it to have an efficient method of communicating with the teachers", App. 28a; *see also* App. 29a, appellees do not rest their case on the fact that appellant was allowed to use the school mail facilities to perform its representational functions: this they appear to concede involves school business. Appellees contend that the non-public character of the facilities has been lost because:

A. The school district has granted appellant "unfettered access", Appellees' Brief at 2, and appellant's use has not been "confined to exercising its representational duties." *Id.* at 3;

B. The school district has allowed "numerous private, non-school connected individuals and organizations . . . to utilize the mail system for purposes wholly unrelated to official school or educational concerns." *Id.* at 2; and

C. Prior to the selection of an exclusive representative in 1977, both appellant and the Perry Local Educators' Association (PLEA) were permitted to use the school mail facilities.

As we demonstrate below, propositions A and B misstate the record, and proposition C reflects a failure on appellees' part to understand the relevant law. Accordingly, these propositions do not provide a basis for concluding that the school mail facilities are a public forum.

A. Appellees simply are wrong when they state that there is "nothing in the Record" to indicate that appellant was granted access to the school mail facilities "solely to perform its role as exclusive bargaining representative of the Perry Township teachers." Appellees' Brief at 11. The provisions of the collective bargaining agreement that grant appellant the access in question (*i.e.*, Article III, §§ 2(C) and (D)) are in evidence. Appellant's Brief at 3-4. They explicitly provide that these "rights and privileges" are accorded to appellant "acting as the representative of the teachers. . . ." What the record is

silent on is whether appellant's *actual use* of the school mail facilities exceeded the limits set forth in the collective bargaining agreement, but this silence cuts against rather than for appellees. If appellees wished to mount a constitutional agreement based upon broader use by appellant, it was their burden to present evidence to support this contention. They have failed to do so.[7]

B. In support of their assertion that the school district has allowed "numerous private, non-school connected individuals and organizations . . . to utilize the mail system for purposes wholly unrelated to official school or educational concerns", Appellees' Brief at 2, appellees refer specifically to the Cub Scouts, YMCAs, church groups and parochial schools. *Id.* at 2, 9. The latter entities all are youth-oriented, and many of their activities are of interest and educational relevance to students. In granting them access to the school mail facilities so that they might more effectively inform the teachers and, through the teachers, the students of these activities, the school district has "preserve[d the facilities] . . . for the use to which [they]are lawfully dedicated." *U.S. Postal Service, supra*, 453 U.S. at 129-130. *See*, Appellant's opening Brief at 12.

Even if we assume that by granting access to the Cub Scouts, YMCAs, church groups and parochial schools, the school district has created a "limited" public forum, *see, Widmar, et al. v. Vincent, et al.*, —— U.S. ——, 102 S.Ct. 269 (1981), the constitutional right of access would in any event extend only to other entities of a similar character. While the school mail facilities thus might be

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[7] Appellees did not in their Complaint (J.A. 3-9), Response to Request for Admissions (J.A. 15-21; see specifically Response to Request for Admission No. 16), affidavits in support of Plaintiffs' Motion in Opposition to Defendants' Motion for Summary Judgment or, in the alternative, Plaintiffs' Cross-Motion for Summary Judgment (J.A. 29-40), or in any other papers filed in the district court even suggest, much less present evidence to indicate, that appellant's actual use of the school mail facilities exceeded the limits set forth in the collective bargaining agreement.

"a forum generally open for use by . . .", (*id.* at 273) the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

C. Appellees attach considerable significance to the fact that, prior to 1978, both appellant and PLEA were permitted to use the school mail facilities "to solicit support for their respective organizations, to provide information to the employees of the School District, and to garner support for their respective points of view on issues of concern and interest to the community". Appellees' Brief at 1.

Invoking the "strict scrutiny" test applied by the court below, Appellees' Brief at 20-21, appellees state that "there is no evidence of any labor disharmony which resulted from PLEA's previous use of the mail system or that the School Board had any reason to believe that labor disharmony would result from PLEA's continued use of the system," *id.* at 3, which, they conclude, belies the suggestion "that the exclusive access policy was justified by the state's interest in promoting labor harmony". *Id.* at 20. In referring to the situation that existed when PLEA had access to the school mail facilities, appellees neglect to mention a significant change in circumstances that has occurred since that time: PEA has been selected as the teachers' exclusive representative. *See, infra,* at p. 13. In any event, this type of "strict scrutiny" analysis begs the basic constitutional issue that is before this Court, since it applies only when judging the constitutionality of access restrictions to *public forums. See,* Appellants' opening Brief at 13.

Appellees appear to use the pre-1978 situation as the basis for a second argument—*i.e.*, that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by

employee organizations, *cf., Widmar v. Vincent, supra,* and once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. Assuming, *arguendo,* that the school mail facilities had prior to 1978 become a limited public forum, it does not follow that the school district never again can restore them to their non-public character.[8] Although there may be limits on a school district's right to restore a non-public forum that has been opened for public use to its prior status, it certainly may do so when, as here, the restoration is reasonable in light of changed circumstances.

Prior to 1977, there was no exclusive representative for the school district's teachers. Appellant and PLEA each represented its own members, and the school district allowed both organizations to use the school mail facilities for communication purposes. During the representation election campaign itself, the ground rules established by the Indiana Employment Relations Board, the state agency responsible for administering the Indiana teacher collective bargaining statute, prohibited both appellant and PLEA from "us[ing] any inter-school mail system or school mail box for the purpose of campaigning." J.A. at 20. After appellant won the election, the school district agreed to give it access to the school mail facilities "acting as the representative of the teachers . . .", and to deny such access to PLEA.

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[8] *See, City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976). In holding that the school board had in that case created a public forum because "the school board meeting at which [the teacher] was permitted to speak was open to the public", *id.* at 174, this Court certainly was not suggesting that all future school board meetings would have to be conducted as public forums. To the contrary, immediately after indicating that exclusions from the meeting in question must be judged by the applicable First Amendment standard, this Court stated that "[p]lainly, public bodies may confine their meetings to specified subject matter and may hold non-public sessions to transact business." *Id.* at 175, n.8.

There is no need to belabor the point. If there is no constitutional obligation to convert a non-public forum to a public forum in the first place, there is no constitutional obligation to keep a non-public forum open for all time, regardless of changes in circumstances. Were the law otherwise, government agencies rarely would provide more than the most limited access to all publicly-owned facilities.

In sum, as both the district court and court of appeals held, the school mail facilities are a non-public forum and, accordingly, the policy governing access to them is constitutional provided it is reasonable and viewpoint-neutral. As we demonstrated in our opening brief, at pp. 13-18, the access policy here in question meets this standard and is thus wholly consistent with the Constitution.

III. THE POSITION TAKEN BY THE UNITED STATES POSTAL SERVICE REGARDING THE PRIVATE EXPRESS STATUTES IS NOT RELEVANT TO THE ISSUES IN THIS CASE

The United States Postal Service (Service) has filed a memorandum as amicus curiae in which it alleges that the "practice involved in this case, whereby union materials are delivered by the school district to teachers at the district's various schools, violates" the Private Express statutes, 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606. The first point to note in this regard is that the Service's interpretation of these statutes has not received judicial sanction and the validity of that interpretation presently is the subject of litigation. See, *National Education Association of the United States, et al. v. William F. Bolger, et al.*, Civil Action No. 82-2320 (U.S. District Court for the District of Columbia). However, even if we assume that the Service correctly has interpreted the Private Express statutes, a decision for appellant in this case would not, as the Service fears, "affect [its] . . . ability to achieve com-

pliance with the Private Express statutes in similar situations." Memorandum for the Service at 2.

As indicated in our opening brief at 5, access rights to two distinct "school mail facilities" are involved in this case: "access, to teachers' mailboxes in which to insert material . . ." (Article II, § 2(C) of the collective bargaining agreement); and "use [of] the inter-school mail system . . . ." (Article II, § 2(D)). The Service does not suggest that the former right poses any statutory problem. Nor does the Service contend that a school district may not under any circumstances use its inter-school mail system to carry any union materials. The Service's position is rather that the statutory prohibition extends only to "letters," *see*, Memorandum for the Service at 1-2, 2a, as opposed to "newspapers" or "periodicals," *see*, 39 C.F.R. § 310.1(a)(7)(iv). Moreover, the Service concedes that even letters may be carried in the inter-school mail system if "postage is paid." Memorandum for the Service at 2. The constitutional issues presented in this case would not be affected if appellant's exclusive access to the inter-school mail system was limited to newspapers and periodicals or conditioned on the payment of postage.

CONCLUSION

For the reasons set forth above and in appellant's opening brief, the decision of the Seventh Circuit Court of Appeals should be reversed with directions that the district court's grant of summary judgment for defendants be affirmed.

Respectfully submitted,

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No. 81-896

In the Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION, APPELLANT

v.

PERRY LOCAL EDUCATORS' ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES POSTAL SERVICE AS AMICUS CURIAE

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Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1981

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PERRY EDUCATION ASSOCIATION, APPELLANT

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ON APPEAL FROM
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THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES POSTAL SERVICE AS AMICUS CURIAE

The Postal Service submits this memorandum to inform the Court of an aspect of this case that has not been raised by the parties. The Private Express statutes, 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, which are administered by the Postal Service, generally prohibit the carriage of letters over post routes without the payment of postage. The practice involved in this case, whereby union materials are delivered by the school district to teachers at the district's various schools, violates this general prohibition and, in the Postal Service's view, is not authorized by any of the statutory exceptions (see 39 C.F.R. Part 310.3) or any additional exceptions that the Postal Service has promulgated in accordance with its rulemaking authority (see 39 C.F.R. Part 320). The Postal Service has stated in several advisory opinions, most recently in an opinion issued to the National

Education Association on January 15, 1982, that the specific practice of carriage over post routes of the letters of a teachers' union by a school district violates the Private Express statutues.[1]

This question does not directly affect the issues decided by the court of appeals in this case. Nonetheless, it is the Postal Service's view that the provision of inter-school mail delivery service by the Metropolitan School District of Perry Township to appellant Perry Education Association—a benefit sought in this litigation by appellee Perry Local Educators' Association—violates the Private Express statutes unless postage is paid. We bring this information to the Court's attention in order to avoid the possibility that the Court's decision in this case might inadvertently affect the Postal Service's ability to achieve compliance with the Private Express statutes in similar situations.[2]

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1982

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[1]A copy of this advisory opinion is appended hereto as an Appendix.

[2]The Postal Service was unaware of this case until January 1982, when the Court agreed to hear the appeal.

APPENDIX

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

January 15, 1982

Maurice Joseph, Esq.
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National Education Association
1201 16th Street, N.W.
Washington, DC 20036

Re: Request for Reconsideration
Advisory Opinion PES No. 76-4

Dear Mr. Joseph:

This responds to the request of the National Education Association (NEA) that the Postal Service reconsider its conclusion, stated in Advisory Opinion PES No. 76-4, that the Salem, Oregon School District may not carry letters of the Salem Education Association unless the applicable rate of postage is paid thereon, and there is compliance with the related procedures contained in 39 C.F.R. 310.2(b)(1)-(6).

In PES No. 76-4, we dealt with a situation in which the collective bargaining agreement between the Salem Education Association and the Salem, Oregon School District provided for the carriage of Association communications directed to District employees, by means of the District's inter-school delivery system. The agreement called for the Association to reimburse the District for costs which it

incurred and, although no payments were made, the District reserved the right to seek reimbursement if the Association's usage increased significantly. We concluded that:

> We believe it reasonable to hold that for purposes of the Private Express Statutes and regulations, compensation exists when, as in this case, the delivery of letters is performed in accordance with a contractual agreement between the sender and the carrier pursuant to which the carrier has the legal right to charge even though the agreement predominantly relates to matters other than the delivery services.

The conclusion in the Advisory Opinion was that the Private Express Statutes, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699, 1724, are applicable to the carriage of those materials which constitute letters, and that their carriage by the District is permissible only if they bear postage and otherwise satisfy the requirements set out in the Postal Service's implementing regulations at 39 C.F.R. 310.2(b), which are based upon the statutory provisions in 39 U.S. Code, §601(a).

The decision in Advisory Opinion PES No. 76-4 relied to some degree upon the proposition that the contractual authority of the District to demand monetary reimbursement gave rise to "compensation" so as to render inapplicable the exception to the Private Express Statutes which permits the private carriage of letters by "private hands without compensation." As we will discuss herein, however, the language of §310.3(c) has been amended to give express recognition to the facts that "compensation" may at times take the form of consideration which is wholly nonmonetary in nature and that the exception will ordinarily not apply when the relationship between the carrier and its user has a business or other economic foundation.

This approach to the concept of "compensation" had been taken in certain opinions antedating the change. Those opinions made it clear that the exception is inapplicable when the carriage is provided as a form of consideration in return for consideration from the sender, as well when the mutual consideration arises out of a formal contract which does not provide for monetary compensation (Advisory Opinion PES No. 76-17) as when it is an employee benefit not founded in contract (Advisory Opinion PES No. 76-14). Accordingly, it is no novelty that the conclusions expressed in this Reconsideration of Advisory Opinion PES No. 76-4 are applicable to all situations in which a school district carries the letters of its faculty and staff unions, whether or not a conditional arrangement for reimbursement has been made.

After a careful review of the case, and of the materials which you have furnished, we affirm our initial conclusion. In doing so we think it appropriate to state with some specificity our position with respect to several arguments which you have raised and also with respect to a particular suspension of the operation of the Statutes which has been adopted since Advisory Opinion PES No. 76-4 was rendered.

1. *The argument that 39 C.F.R. 310.3(c) was incorrectly interpreted.*

You make the argument first that delivery of Association materials by the District is made without "compensation" for purposes of the *Private hands without compensation* exception, since there has been no monetary exchange between the sender and the carrier.

At the time Advisory Opinion PES No. 76-4 was issued, 39 C.F.R. 310.3(c) was worded so as to permit "[t]he sending or carrying of letters *if no charge for carriage* is made by the carrier." (Emphasis added.) Effective October 11, 1979, that exception was amended to read in pertinent part as follows:

> The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letters will ordinarily not fall under this exception; . . .

As the Federal Register notice of proposed rulemaking concerning that amendment (43 F.R. 60615, 60618 (Dec. 28, 1978)) indicated, the new wording served only to clarify, rather than to change, the Postal Service's established position, reflected in previous Advisory Opinions, that "compensation" could take the form of non-monetary valuable consideration and of good will.

There had long beer precedent for the Postal Service's view that such "consideration" makes the *Private hands without compensation* exception inapplicable. Over a century ago, a Federal district court stated that the then-existing Statutes—not significantly different from those presently in effect—"did not authorize the defendant to establish an express for the carrying of letters in connection with, or as part of his business of a merchandise express, *although no charge was made for letters as such.*" *United States* v. *Thompson*, 28 F. Cas. 97, 98 (No. 16,489) (D. Mass. 1846) (emphasis added). Further, an opinion of the Attorney General of the United States noted that if, for the sake of argument, railroads could be considered to be "private hands . . . my opinion is that the express or implied obligation of railroads to carry letters for each other to remotely connecting lines would amount to 'compensation' within the meaning of the statute." 21 Op. Atty. Gen. 394, 401 (1896).

The current wording of the exception and the precedent underlying its inclusion, then, clearly render the Association's claim that no monetary consideration is paid for carriage inadequate in and of itself to trigger the exception. When, as here, the carriage of letters is performed by one party to an ongoing economic relationship for the benefit of another party, we consider that that act simply cannot realistically be isolated from the context of the relationship and characterized as being performed "without compensation." The 1979 amendment to the regulation merely gives express recognition to the fact that in the business world compensation can take the form of non-monetary consideration or good will.

Indeed, "compensation" must be viewed in this manner if easy circumvention of the Private Express restrictions is to be avoided. Certainly a barter arrangement involving the carriage of letters in exchange for goods or services would not be "without compensation." We think it clear that a substantially similar situation exists when the carriage of letters is included as one of several items in an arrangement such as a collective bargaining agreement, even though no specific consideration is assigned to that item.

An obligation which results from the collective bargaining process cannot be dismissed, as you intimate, as the equivalent of the distribution of a political candidate's materials by a volunteer hoping for some future advantage, or of the performance of altruistic or charitable acts from which one derives some moral benefit. If indeed it was the understanding of the School District and the Association that the former would carry the latter's materials with no expectation of any sort of compensation, it is difficult to understand why the delivery provision was included as an element in the agreement between the two entities at all. It is also difficult to understand how the School District would justify the expenditure of public funds for the provision of a

service from which it expected to derive no benefit. We must therefore conclude as we did previously that the *Private hands without compensation* exception is inapplicable here.

2. *The argument that the Letters of the carrier exception, 39 C.F.R. 310.3(b), is applicable.*

You contend that the letters of the Association come within the *Letters of the carrier* exception because the reciprocal obligations of the District and the Association under the collective bargaining process "assure the orderly operation of the business of the District, *i.e.*, the maintenance of the public schools in Salem . . . [so that] . . . the delivery of the Association's letters to the employees of the District [is] intimately connected to the 'business of the carrier'."

We understand your argument to be that the letters of the Association may be carried by the District under the *Letters of the carrier* exception because they are addressed to employees of the District "on the current business of" the District. The sense in which they are "on the current business of" the District, you argue, is that the conduct of employee relations is a part of the business of the District and since the Association is the exclusive bargaining representative of the District's professional employees, its letters relate to, or are "on", this business.

As we discuss below, however, we think it clear that interrelated though their activities and goals may be, the District and the Association are legally distinct entities in every sense, the Association's letters to its members can in no sense be regarded as sent by or addressed to the carrier-District, and the exception is therefore inapplicable.

When we rendered our original opinion in this case, the *Letters of the carrier* exception applied by its terms to letters "sent by or addressed to an officer or employee of a carrier on the current business of the carrier (*i.e.*, in his capacity as

an officer or employee)." That language has since been modified *for purposes of clarification only* (see 43 F.R. 60615, 60618). The regulation now reads as follows:

> The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person . . . and the letters must relate to the current business of such person. (39 CFR §310.3(b)(1).)

Any argument that the Association's letters may be carried by the School District pursuant to this exception fails under either version. The exception is intended to permit any "person" to carry outside the mails his own letters, that is, those sent by or intended for him. When the "person" is an organization rather than an individual, the organization's employees may lawfully carry letters *sent by or addressed to it*, since an organization can only act through such persons. The letters may permissibly bear the names of employees other than the actual courier-employees, but they must be sent by or addressed to employees in their capacities as representatives of the organization.

In asking additionally whether letters sent by or addressed to an organization relate to its current business, the Postal Service is not, as you contend, inquiring into the subjective feelings of the carrier toward the contents of what it is carrying. That requirement is included in order to ensure that correspondence transported by a carrier to or from its officers and employees concerns those persons in their business capacities, so that the letters are in fact those of the carrier. The "relate to the current business" standard in no way alters the primary requirement that, as with natural persons, the letters must be sent by or addressed to the organization. Both conditions must exist, and the fact that

the message pertains to a matter of obvious interest or concern to the carrier will not transform that carrier into its sender or addressee.[1]

Neither may the union be considered a part of the School District for purposes of the exception, so that letters which it directs to its membership could somehow also be regarded as letters of the School District. The separateness of the two entities is established and fostered by provisions in the Oregon Code defining unfair labor practices in the area of public sector employment. Significantly, some of the correspondence being carried could well relate to internal, administrative matters of the Association which are actually strictly "off limits" to the District by virtue of O.R.S. §243.672(1)(b). A general principle underlying all labor relations legislation of which we are aware is the maintenance of a wholly independent, arms-length relationship between the employer and the actual or prospective representative of its employees. The School District as employer in this context can in no sense be considered an originator of materials directed by the employee representative to its membership.

Based upon all the foregoing, we must conclude that the *Letters of the carrier* exception is inapplicable in these circumstances.

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[1] *See* 29 Op. Atty. Gen. 418 (1912), in which the Attorney General concluded that the Erie Railroad Company could transmit letters from the Erie Employee's Relief Association, a separate organization having responsibility for the company pension fund, to the Railroad Company pursuant to the *Letters of the carrier* exception, but not from the Association to its members, the carrier's employees. That opinion stated that "letters being neither written by nor addressed to the carrier, are not communications of the carrier itself," and that "[i]t is not material that the purpose of the association and the subject of its communications is a pension system for the carrier's employees, and so a matter of interest to it, for the law excepts only the communications of the carrier itself." (*Id.* at 419).

3. *The argument that the Postal Service did not take into account the intent of the Private Express Statutes.*

It is your contention that "the primary purpose of the Private Express Statutes was to prevent profit-making enterprises from diverting substantial amounts of mail from the Postal Service thereby rendering the Postal Service less capable of fulfilling its statutory duties. Since the agreement between the District and the Association is in no way related to the type of activity which Congress intended to prevent, we believe that the application of these Statutes to this situation is unjustified . . . and that . . . there is not the slightest possibility that the Association's use of the District's system will either (1) affect the economies of scale; or (2) produce a cream-skimming operation; or (3) interfere with the handling of international mail."

There is no question but that a major purpose of the Private Express Statutes is to limit the loss of revenue which would result if there were no restrictions on the carriage of letters by persons who would engage in this activity as a business. This type of competition is not, however, the only type that can cause the loss of revenue which the Statutes are designed to minimize. Our position that the Statutes apply to the carriage of letters by non-commercial organizations recognizes this fact, and is consistent with the principle that revenue protection statutes should be interpreted in a manner that will effectuate their purpose.[2] Also significant in this regard are statistics you have provided to demonstrate that the carriage of union letters by school districts is wide-spread, since they would seem to contradict your

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[2]The Private Express Statutes have consistently been held to apply to non-commercial organizations. *See*, e.g., Advisory Opinion PES Nos. 75-34 (City University of New York), and 76-9 (State of North Carolina).

apparent position that such practices do not have a meaningful impact on postal revenues in terms of volume.

Even assuming the accuracy of an assertion that this particular type of activity does not of itself have a significant economic impact, it is surely true that the cumulative economic effect of withholding enforcement of the regulations in every individual case where the revenue loss in question appears small would ultimately be quite significant. As Justice Brennan pointed out in his opinion concurring in a recent decision of the Supreme Court which upheld the constitutionality of the statutory restrictions on the use of letter boxes (18 U.S. Code § 1725) as applied to nonprofit civic associations:

> The District Court's finding that the "failure to enforce the statute as to [appellees] would [not] result in a *substantial* loss of revenue" may be true [citation omitted], but that conclusion overlooks the obvious cumulative effect that the District Court's ruling would have if applied across the country. Surely, the Government is correct when it argues that the Postal Service "is not required to make a case-by-case showing of a compelling need for the incremental revenue to be realized from charging postage to each organization or individual who desires to use the postal system to engage in expression protected by the First Amendment." *United States Postal Service* v. *Council of Greenburgh Civic Associations, et al.*, 49 U.S.L.W. 4813, 4819 (1981).

There are few persons or organizations wishing to send letters out of the mails who could not make the same *de minimis* argument. A rational, even-handed administration of the Statutes cannot well survive the acceptance of such an argument as a basis for their interpretation.

4. *The argument that the Postal Service's opinion disturbs an existing pattern.*

The Postal Service has pointed out that existing practices will be taken into account as an element in the administration of the Private Express Statutes. We have not, however, taken the position that an existing pattern is, in and of itself, a sufficient basis upon which to determine that a means of private delivery is permissible.[3] Accordingly, although we acknowledge the statistical information that you provided regarding the estimated extent to which school districts carry union materials, we are unable to conclude that this information warrants a reversal of our prior opinion. Were we to conclude otherwise, we would effectively be creating a prescriptive right permitting every practice, however inconsistent with the Statutes, which could be shown to have existed in the past. Even if this were accepted from a public policy standpoint, it would give rise to a host of administrative problems. Questions would arise, for example, as to whether we should then permit the practice to continue only in school districts where it had previously existed, or whether we should allow it in all districts because it had existed in some. It might further be asked whether we should permit it in all districts only if it had been the practice in a majority of districts or in some weighted preponderance.

In addition to weighing such problems of administration, we must always hold paramount the strong public interest in enforcement of these revenue protection statutes, enacted

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[3]In the first of the two Notices of Proposed Rulemaking preceding the existing Private Express regulations, the Postal Service noted that certain proposed suspensions were "intended, in part, to continue preexisting practices." 38 Fed. Reg. 17512. It was also noted that: "The proposed regulations are generally not intended to alter established practices *except to the extent that the public interest appears to warrant a change*" (emphasis added). *Id.* at 17513.

by Congress to ensure the continued existence of a solid revenue base for the maintenance of nation-wide postal service at uniform rates. We think it clear that that important interest is most effectively served by the universal application of the restrictions, subject only to the very limited exclusions, exceptions, and suspensions appearing in the implementing regulations. As we observed in the previous section, to the extent that the statistics you have provided demonstrate the existence of a widespread practice, they also indicate a considerable loss of postal revenue in contravention of the purpose behind the Private Express Statutes. It follows that they will not serve as sufficient justification for a decision not to enforce those Statutes.

5. *The Suspension for certain letters of college and university organizations (39 C.F.R. § 320.4) cannot be extended to cover school districts by analogy.*

During the period in which we have had our decision in this matter under reconsideration the Postal Service has adopted a *Suspension for certain letters of college and university organizations* (39 C.F.R. §320.4, effective October 11, 1979). Because there are evident, if ultimately superficial, similarities between the subject of that suspension and this matter, we consider it appropriate to discuss any significance which the suspension may have for school district delivery systems. For the reasons stated below, we have concluded that the factors we deemed to warrant adoption of that suspension simply do not carry over to the school district setting.

We note initially that any institution, whether college or school district, may carry its *own* letters without restriction, in accordance with the *Letters of the carrier* exception (18 U.S.C. §1694, 39 C.F.R. §310.3(b)). *The Suspension for certain letters of college and university organizations* applies rather to carriage by a college of the letters of student

and faculty organizations which serve the campus community but which technically are not a part of the college itself. The suspension was intended to remove a largely fortuitous distinction among colleges and universities based upon their physical arrangement and the presence of post routes on some campuses which bring the Private Express Statutes into play.

In the absence of the suspension, universities with wholly self-contained campuses not intersected by post routes could freely deliver internally the letters of any sender or addressee, whether a part of the institution or not, while the delivery systems of universities with more widely dispersed facilities and intervening post routes would carry any letters other than the school's subject to the Private Express Statutes. The regulation enables the Postal Service to treat all colleges and universities similarly when they carry the letters of their student and faculty organizations.

We note further that, in the application of this suspension to a specific college or university, the bounds of the institution itself constitutes the permissible bounds of a delivery service operating in accordance with the regulation's terms. In the interests of ease of administration and the even-handed treatment of all such institutions the decision was made to accept the institution's own definition of its limits rather than to attempt to impose such definitions ourselves. It follows that since some large universities encompass many campuses located at considerable distances from one another, the suspension permits certain "internal" delivery systems to carry without restriction the materials of faculty and student organizations over many miles of routes also served by the Postal Service.

Certain similarities between this type of large university system and the school district may appear to suggest that the suspension, or essentially similar treatment, ought to be afforded school districts as well. There may well, of course,

be instances in which a Board of Regents or other governing body linking together a multi-campus university functions much as the school district functions with respect to its component public schools, serving as an "umbrella" organization to those components for certain limited purposes. The analogy between the two types of systems could appear even more striking because of their common mission of providing education. A distinction which appeared to be drawn solely on the basis of the level of education provided could be perceived as arbitrary and insupportable, and it might be concluded that the coverage of the suspension ought to extend to school districts.

It should be apparent from our discussion of the reasons giving rise to the suspension, however, that the distinction which is, in effect, being drawn between universities on the one hand and school districts on the other is in no sense rooted in the level of education provided. Unlike universities, school districts by their very nature will generally encompass widely dispersed facilities linked by intervening post routes.[4] It follows that there simply is not a significant problem of disparate treatment based upon the presence of post routes in some districts and their absence in others. Thus, the basic justification for issuance of the suspension with respect to colleges and universities is lacking in the school district context.

There is another significant difference between the two types of systems. In the Notice of Proposed Rulemaking

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[4]Given the number and varied circumstances of school districts throughout the United States, we are reluctant to say categorically that there are no instances in which all of the schools in a district can be reached without traveling on a post route. Both logic and our own experience suggest, however, that such instances would be atypical, at least of districts having faculty organizations of any size.

which preceded issuance of the *Suspension for certain letters of college and university organizations* (43 F.R. 60615-23, December 28, 1978), we emphasized that while some student and faculty organizations—those which would be affected by the existence of the suspension—are not *legally* part of a university, they frequently are regarded as "performing important functions in the operation of the academic community," and are "often supported in a number of ways by the college or university proper." It was this type of university organization, such as the school newspaper or intramural sports league, that the Postal Service had in mind when it issued the suspension. Again, in the absence of the suspension only the letters of organizations legally a part of the university could be carried without restriction. Our purpose was to avoid making distinctions among campus organizations based on circumstances, primarily independent incorporation, which are largely immaterial to their functioning as part of the life of the campus community.

A parallel to this core of "university community" organizations is generally not to be found at the school district level. We regard the carriage of faculty union materials by a university delivery system—to the extent that it is permitted by the suspension—as purely incidental to the carriage of the materials of organizations more truly an integral part of the life of the university. It is covered only by virtue of the breadth of the term "faculty organizations." Insofar as the school district lacks a core of organizations contributing to a community-like atmosphere analogous to that of the college or university, carriage of faculty union materials could not be viewed as an incidental use of a delivery system functioning *primarily* for the benefit of the district itself and that closely-related core.

Because the considerations leading up to adoption of the *Suspension for certain letters of college and university*

organizations do not exist in the school district context, we consider that the distinction between the two types of systems is a sound one, and that neither the adoption of a new suspension nor application of the existing one to school districts is warranted.

Conclusion: For the foregoing reasons, we affirm the conclusion reached in Advisory Opinion PES No. 76-4.

Please let me know if we can be of additional assistance to you.

Sincerely,

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Amicus Brief

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No. 81-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION, *Appellant*,

v.

PERRY LOCAL EDUCATORS' ASSOCIATION, EVELYN E. WADDELL, and JUDITH M. DIETRICH, *Appellees*.

On Appeal from the United States Court of Appeals
For the Seventh Circuit

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No. 81-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERRY EDUCATION ASSOCIATION, *Appellant,*

v.

PERRY LOCAL EDUCATORS' ASSOCIATION, EVELYN E. WADDELL, and JUDITH M. DIETRICH, *Appellees.*

On Appeal from the United States Court of Appeals For the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF PUBLIC SERVICE RESEARCH COUNCIL

Pursuant to Rule 36 of the Rules of this Court, Public Service Research Council submits this brief *amicus curiae* in support of Appellees Perry Local Educators' Association, Evelyn E. Waddell, and Judith M. Dietrich. All parties to this case have given written consent for the participation of the Council as *amicus curiae,* letters from counsel to which effect have been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

Public Service Research Council is an independent national association of some 900,000 private citizens, legislators, scholars, and commentators united by a common concern for the maintenance of limited, constitutional government. The Council engages in non-partisan research and education regarding the character of public-sector unionism and collective bargaining, and their effects on the nation's governmental institutions and the provision of public services to all Americans.

The Council has developed considerable expertise concerning the philosophical, political, social, legal, economic, and practical aspects of public-sector unionism and collective bargaining—and, on numerous occasions, has provided this and other Courts with its views in briefs *amicus curiae*.[1]

In the instant appeal, the Council believes that the parties may not fully present to this Court what the Council sees as central to a complete understanding of this case, and to an appreciation of its long-term implications: namely, what public-sector bargaining through exclusive representation fundamentally entails; how the present controversy reflects and is a

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[1] National League of Cities v. Usery, No. 74-878 (U.S. Sup. Ct.); City of Madison, Joint School Dist. No. 8 v. WERC, No. 75-946 (U.S. Sup. Ct.); Jackson Transit Authority v. Local Division 1285, Transit Union, No. 81-411 (S. Ct.); PATCO v. United States, No. 81-542 (U.S. Sup. Ct.); Virginia v. Arlington County Bd. of Supervisors, No. 18747 (Va. Ct. App.); Pacific Legal Foundation v. Brown, 3 Civil No. 18364 (Cal. Ct. App.); United States v. PATCO, Civil Action No. 81-1805 (D.D.C.); United States v. PATCO, Civil Action No. 81-0763A (E.D. Va.); Air Transport Ass'n of America v. PATCO, No. 70-C-400 (E.D.N.Y.).

product of that nature; and why this Court must apply uncompromising First- and Fourteenth-Amendment standards to every act of an exclusive representative in public-sector employment. For that reason, the Council submits this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

This case illustrates that, as applied by private special-interest groups such as the Perry Education Association, unrestricted public-sector collective bargaining through exclusive representation tends inevitably to impose ideological conformity on dissident public employees, in order to secure a political monopoly for the representative. And it provides a striking example of the necessity for this Court absolutely to disallow such monopolies, and otherwise to require that all actions of an exclusive representative satisfy the strictest standards of the First and Fourteenth Amendments.

ARGUMENT

The real constitutional issue in this case is not whether teachers' mailboxes in the Metropolitan School District of Perry Township constitute a "public forum" under the First and Fourteenth Amendments.[3] The well-reasoned and -articulated opinion of the Court of Appeals settles this question with intellectual

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[3] *Pace* Jurisdictional Statement, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, No. 81-896 (U.S. Sup. Ct., filed 12 Nov. 1981), at i, *and* Brief for Appellant, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, No. 81-896 (U.S. Sup. Ct., filed 11 Mar. 1982), at 12-13.

and legal finality.[3] Rather, the underlying problem which this Court must address is the definition and imposition of strict, principled constitutional limitations on the process of public-sector collective bargaining through exclusive representation, so as to conform that process (if possible) to fundamental tenets of individual liberty and representative government.

To accomplish that task, this Court must: (i) appreciate the peculiar and dangerous nature of unrestricted public-sector bargaining under our form of government; (ii) recognize that the instant case embodies the problem of governmentally coerced political and ideological conformity inherent in all such bargaining; (iii) rule that such conformity, as the Perry Education Association attempted to impose it here, is antithetical to the guarantees of the First and Fourteenth Amendments; and (iv) establish the general principle that public-sector bargaining, in all its manifestations, demands the most searching and uncompromising judicial supervision—and, where necessary, disapprobation—possible under our Constitution.

I. Public-sector collective bargaining through exclusive representation is anomalous in and inimical to a free society because it assumes that the imposition of ideological conformity among citizens is a proper function of private groups acting under color of law.

Enthusiasm among politically influential public-employee unions and some legislators and public administrators for public-sector collective bargaining

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[3] Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286 (7th Cir. 1981). *See* Vieira, "Exclusive Representation *versus* Freedom of Petition for Nonunion Public Employees—A Study in Irreconcilable Constitutional Conflict", 1977 *Det. C. L. Rev.* 499.

through exclusive representation, and its adoption and implementation in various States and local jurisdictions throughout the United States, initially outstripped careful analysis of its myriad practical, economic, legal, political, and (ultimately) philosophical problems. Today, however, "[d]espite * * * impressive signs of vitality", knowledgeable observers

> expect the demise of public sector bargaining in the next 20 years. *Intellectually, it is already dead.* Like government-enforced racial segregation, its practical and political manifestations survive its intellectual demise, but the long-range forecast for public sector bargaining is a decline on all fronts.[4]

That public-sector bargaining is a largely unworkable procedure for allocating increasingly scarce public revenues among competing governmental services is now well-documented, both theoretically[5] and empirically.[6] Simply put, it is economically impractical.

That the fundamental structural element of public-sector bargaining, exclusive representation, infringes the First- and Fourteenth-Amendment freedoms of

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[4] Lieberman, "Teacher Bargaining: An Autopsy", *The Kappan* (Dec. 1981), 231, 232 (emphasis supplied).

[5] *E.g.*, R. S. Summers, *Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique* (N.Y. State School of Indus. & Lab. Rel'ns, Inst. of Pub. Employment, Monograph No. 7, Nov. 1976).

[6] M. Lieberman, *Public-Sector Bargaining: A Policy Reappraisal* (1980); *idem*, "The Costs of Collective Bargaining in the Modesto City School Districts: A Case Study", *Gov't Union Rev.*, Vol. 2, No. 1 (Winter 1981), at 3.

dissenting public employees this Court has recognized.[7] And extensive studies in the legal literature have revealed the full extent of its repugnance to almost the entire spectrum of basic constitutional guarantees of individual liberty.[8] Simply put, except perhaps in narrowly circumscribed situations,[9] exclusive representation is legally indefensible.

That the power of the States and their instrumentalities to determine the terms and conditions of employment of the employees who "carry out their governmental functions" is "[o]ne undoubted attribute of state sovereignty",[10] and that the decisions of local school boards have "significant governmental and public policy dimensions",[11] this Court has also recognized. And no one seriously disputes that public-sector bargaining over terms and conditions of employment "simply cannot be engrafted on to [the] democratic [pro-

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[7] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222-23 (opinion of Stewart, J.), 255 (Powell, J., concurring in the judgment) (1977); City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167 (1976).

[8] Vieira, "Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of 'Exclusive Representation' in Public-Sector Employment", 12 *Wake Forest L. Rev.* 515 (1976); *idem*, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293 (1978). *Compare* the latter article *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 255-57 (1977) (Powell, J., concurring in the judgment).

[9] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 262-63 & n.16 (1977) (Powell, J., concurring in the judgment).

[10] National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[11] Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 495 (1976).

cess] without redistributing power" from governmental officials to the exclusive representatives of public employees.[12] Therefore, the inconsistency of public-sector bargaining with our fundamental conception of governmental sovereignty is self-evident.[13] Moreover, "[t]hat public sector bargaining is inconsistent with democratic government is no longer in doubt", either.[14] As all students of this subject are aware, the primary purpose and effect of public-sector bargaining through exclusive representation is to "giv[e] added force and political weight to [the exclusive representative's] voice in the public forum".[15] Yet, as this Court has emphasized, "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional

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[12] R. S. Summers, *ante* note 5, at 3. *Accord, e.g.*, Wellington & Winter, "The Limits of Collective Bargaining in Public Employment", 78 *Yale L. J.* 1107, 1109 (1969) ("a great deal of shared control is implicit in any scheme of collective bargaining").

[13] *See* Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974).

Scholars from the entire range of political opinion concur in identifying public-sector bargaining as inherently governmental in character. *See, e.g.*, Summers, "Public Sector Bargaining: Problems of Governmental Decision Making", 44 *Cinn. L. Rev.* 669 1975); H. Wellington & R. Winter, *The Unions and the Cities* (1971), at 24-32; K. Hanslowe, *The Emerging Law of Labor Relations in Public Employment* (1967), at 115-17; H. Linde & G. Bunn, *Legislative and Administrative Processes* (1967), at 585-86. *See also* J. Ely, *Democracy and Distrust* (1980), at 131-34.

[14] Lieberman, *ante* note 4.

[15] Summers, *ante* note 13, 44 *Cinn. L. Rev.* at 674. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228-29 (1977) (opinion of Stewart, J.).

guarantees".[16] On its face, the "commitment" inherent in exclusive representation "to exclude minority viewpoints from the councils of government * * * violate[s] directly the principle that 'government must afford all points of view an equal opportunity to be heard' ", and unconstitutionally "dilute[s]" the "voting power and influence on the decisionmaking process" of all other citizens.[17] Therefore, the inconsistency of public-sector bargaining with our fundamental conception of popular sovereignty is self-evident, too.[18] Simply put, public-sector bargaining is politically antagonistic to democratic, representative institutions.

Finally, that statutorily imposed collective bargaining effectively delegates to exclusive representatives a power to enact "economic laws" binding on the employ-

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[16] City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 175-76 (1976) (footnote omitted).

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). *Accord*, Citizens Against Rent Control v. City of Berkeley, —— U.S. ——, ——, 102 S. Ct. 434, 437 (1981); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-92 (1978). Reciprocally, the concept that government may *enhance* the speech of some elements of our society in order to attenuate the relative voice of others is equally repugnant to constitutional values.

[17] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 261 & n.15 (1977) (Powell, J., concurring in the judgment).

[18] Summers, "Public Sector Collective Bargaining Substantially Diminishes Democracy", *Gov't Union Rev.*, Vol. 1, No. 1 (Winter 1980), at 1; E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Danger to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980).

ees for whom they negotiate both scholars [19] and this Court [20] have repeatedly recognized. Indeed, "[t]he collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all the attributes of legislation for the subjects with which it deals".[21] Public-sector bargaining thus conforms to the *corporative-state form* of economic-*cum*-political organization, the arrangement that licenses private special-interest groups to exercise monopolistic prerogatives to promulgate "laws" outside the normal legislative process.[22] This Court has already

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[19] *E.g.*, Summers, "Union Powers and Workers' Rights", 49 *Mich. L. Rev.* 805, 815-16 (1951) (emphasis supplied):

> A union, in bargaining, acts as the representative of all workers within an industrial area. It weighs alternatives and determines policies which vitally affect all those whom it represents. It negotiates a contract which becomes the basic law of that industrial community. In making these laws, the union acts as the worker's economic legislature. After the laws have been made, the union is charged with their enforcement, and through its grievance procedure helps judge their interpretation and application. It is the worker's policeman and judge. *The union is, in short, the employee's economic government. The Union's power is the power to govern.*

[20] *E.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192, 198-203 (1944) ("[exclusive] representative is clothed with power not unlike that of a legislature"); United Steelworkers of America v. Warrior & Gulf Mfg. Co., 363 U.S. 574, 578-80 (1960) ("collective bargaining agreement is an effort to erect a system of industrial self-government").

[21] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 252-53 (1977) (Powell, J., concurring in the judgment).

[22] *See* Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1 (Winter 1981), at 56. *See also* P. Bradley, *Constitutional Limits to Union Power* (1976).

held corporative-state schemes in the private sector utterly beyond the power of government to establish.[23] There being no rational basis for distinguishing public- from private-sector arrangements in this context, public-sector bargaining must be equally invalid. Simply put, it is philosophically at odds with the first principles of our socio-political system.

Public-sector bargaining offends these principles, undermines governmental and popular sovereignty, tramples the liberties of public employees, and frustrates the efficiency and good order of the public service because its key structural element, exclusive representation, embodies the perverse notion that private special-interest groups may impose political and ideological conformity on dissenting individuals under color of law. This, of course, is not accidental: The essence of all corporative-state institutions is *monopoly of political influence.*[24] The indispensable prerequisite for a monopoly of political influence within any group is unanimity of action by its members. To achieve unanimity of action demands conformity of opinion throughout the group. And to guarantee effective conformity of opinion among individuals who may disagree over the group's goals, or how to attain them, requires the coercive device of governmentally sponsored exclusive representation

In theory and in practice, exclusive representation dragoons individuals into "goose-stepping brigades" of

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[23] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[24] As Mr. Justice Marshall has perceptively recognised specifically in the "labor" context. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 366-67 (1974) (dissenting opinion).

ideological conformists, "at least partially regimented behind causes which they oppose". "Those brigades", however, "are not compatible with the First Amendment." For "the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority".[25] Only by focusing intently on this reality, can the Court fully appreciate the meaning and significance of the instant litigation.

II. The instant case provides a further example of the perverse insistence for ideological conformity characteristic of public-sector collective bargaining through exclusive representation that this Court condemned in *City of Madison* and *Abood*.

The abstract question of the unconstitutionality of exclusive representation is not here for decision. Nevertheless, the consistent course of this Court's opinions on the subject should inform its deliberations in this case. For the stark judicial fact is that this Court has never sustained exclusive representation, in principle or as applied, in private employment, in public employment, or in any other area of human endeavor outside the electoral process itself. Instead, in every instance wherein the issue arose, the Court has declared the device unconstitutional, in whole or in part.

The leading decision in private employment is *Carter* v. *Carter Coal Co.*[26] As the Court said there, referring to the exclusive-representation labor-provisions of the Bituminous Coal Conservation Act,[27]

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[25] Lathrop v. Donohue, 367 U.S. 820, 884-85 (1961) (Douglas, J., dissenting).

[26] 298 U.S. 238 (1936).

[27] Act of 30 August 1935, ch. 824, 49 Stat. 991.

> [t]he effect, in respect of wages and hours, is to subject the dissentient minority * * * to the will of the stated majority * * *.
>
> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[28]

And, as Chief Justice Hughes added,

> [t]he [majority-rule] provision permits a group of * * * employees, according to their own views of expediency, to make rules as to hours and wages for other * * * employees who are not parties to the agreements. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirements of due process of law * * *.[29]

Self-evidently, the holding of *Carter* applies to every form of governmentally imposed exclusive representation,[30] and is as valid and vital today as when enunciated nearly half a century ago.[31]

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[28] 298 U.S. at 311.

[29] *Id.* at 318 (concurring opinion). *Accord,* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

[30] As *Carter* turned on a statutory delegation of legislative power to private groups, it would not apply to voluntary arrangements adopting exclusive representation that private employers and unions negotiated under common law or pursuant to merely permissive statutory authority.

[31] The *Carter* Court premised its holding on earlier decisions in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495

After *Carter,* the unconstitutionality of exclusive representation in private employment escaped judicial review on three occasions. When the validity of the National Labor Relations Act[32] was first in issue, the Labor Board selected its test-cases "intentionally [to] avoi[d] presenting the Court with [this] 'touchy' and * * * doubtful questio[n]".[33] And in *Jones & Laughlin Steel Corp.* v. *NLRB,*[34] this Court avoided the problem of *exclusive* representation by interpretating the statute to permit individual employees to bargain directly with their employer over the terms and conditions of their employment.[35] Similarly, in a contemporaneous challenge to the Railway Labor act[36] in *Virginian*

(1935), *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116 (1928), and *Eubank* v. *City of Richmond,* 226 U.S. 137 (1912). 298 U.S. at 311-12. Since then, these cases have received approbation in many opinions. Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 676-77 (1976); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1973); McGautha v. California, 402 U.S. 183, 271-72 (1970) (Brennan, J., dissenting); Arizona v. California, 373 U.S. 546, 626 (1962) (Harlan, J., dissenting).

[32] Act of 5 July 1935, ch. 372, 49 Stat. 449, *now* 29 U.S.C. § 151 *et seq.* (1976).

[33] J. A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* (1974), at 187.

[34] 301 U.S. 1 (1937).

[35] Id. at 45 (act does not prevent "employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ").

[36] Act of 20 May 1926, ch. 347, 44 Stat. 577, *now* 45 U.S.C. § 151 *et seq.* (1976).

Railway v. *System Federation No. 40*,[37] the Court held that exclusive representation under that statute allowed individual contracts between an employer and his employees.[38] The later decision in *Steele* v. *Louisville & Nashville Railroad Co.*[39] also pretermitted the issue, by creating the "duty of fair representation"—precisely to avoid grappling with serious problems of due process and equal protection that unlimited exclusive representation raised.[40]

In its first decision involving public employment, *City of Madison, Joint School District No. 8* v. *WERC*,[41] this Court felt it unnecessary to define "the extent to which true contract negotiations between a public body and its employees may be regulated".[42] But it squarely held that the First Amendment disables an exclusive representative from depriving a

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[37] 300 U.S. 515 (1937).

[38] *Id.* at 548-49.

Only seven years later, in cases raising issues of statutory construction alone, did this Court re-interpret the National Labor Relations and Railway Labor Acts to preclude individual contracts under some circumstances. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin* and *Virginian Railway*, although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 745, 789-91 (1940).

[39] 323 U.S. 192 (1944).

[40] *Id.* at 198.

[41] 429 U.S. 167 (1976).

[42] *Id.* at 175.

dissenting public-school teacher of an opportunity to address a public meeting of the school board concerning a subject then under negotiation between the representative and the board. Although not invalidating exclusive representation *in toto, City of Madison* thus established that "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who * * * might wish to express his view about governmental decisions concerning labor relations".[43] This Court's later decision in *Abood* v. *Detroit Board of Education*[44] also provided no opportunity to examine the unconstitutionality of exclusive representation in depth.[45] However, *Abood* did squarely hold that the First Amendment disables an exclusive representative from compelling dissident public-school teachers

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[43] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977) (opinion of Stewart, J.).

[44] 431 U.S. 209 (1977).

[45] No challenge to exclusive representation appeared in the *Abood* complaints. Appendix to Brief for Appellants, Abood v. Detroit Bd. of Educ., No. 75-1153 (U.S. Sup. Ct., filed 2 July 1976), at 6-15, 39-52. Neither did the trial or lower appellate courts purport to rule on the matter. *Id.* at 94-104. Nor did any of the parties present the question in any respect. Jurisdictional Statement, Abood v. Detroit Bd. of Educ., No. 75-1153 (U.S. Sup. Ct., filed 13 Feb. 1976), at 6; Brief for the Appellants, Abood v. Detroit Bd. of Educ., No. 75-1153 (U.S. Sup. Ct., filed 9 July 1976), at 4; Brief for Appellees, Abood v. Detroit Bd. of Educ., No. 75-1153 (U.S. Sup. Ct., filed 10 Sept. 1976), at x. Indeed, the parties explicitly reserved argument on the constitutional merits of exclusive representation, recognizing that the "appeal does not raise the question". Brief for the Appellants in *Abood, ante*, at 148. *See*, to like effect, *id.* at 126-27, 149-50; Brief for Appellees in *Abood, ante*, at 34; Reply Brief for the Appellants, Abood v. Detroit Bd. of Educ., No. 75-1153 (U.S. Sup. Ct., filed 4 Nov. 1976), at 39.

to provide financial support to "ideological cause[s]" they oppose."[46] *City of Madison* and *Abood* thus articulated the principle that a private special-interest group may not constitutionaly use its position as exclusive representation under a public-sector bargaining statute to protect or enhance its own political influence at the expense of dissenting employees either: (i) by forbidding those employees to speak to governmental officials in opposition to the representative's position; or (ii) by requiring them, through financial contributions, to speak to the public in support of candidates or to legislators in support of causes the representative favors.

The instant case presents a new factual situation to which this principle applies. In *City of Madison* the communicative relationship this Court protected involved dissident employees and public officials. In *Abood* the relationship involved dissident employees, the electoral public, and legislative bodies. In this litigation, the relationship involves dissident employees organized in the Perry Local Educators' Association and other teachers in the Metropolitan School District. In each instance, the relationship was or is ideological—or, more precisely, political—in nature: lobbying, in *City of Madison*; electoral politics and lobbying, in *Abood*; and the politics of "industrial self-government", here. In each instance, the goal of the exclusive representative was or is to impose conformity of opinion on the dissidents, in order: to promote its collective-bargaining policies, as in *City of Madison*; to provide support for its favorite political candidates and causes, as in *Abood*; or to protect its exclusive-

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[46] 431 U.S. at 235 (opinion of Stewart, J.).

representational status, as here. And in each instance, the exclusive representative acted under color of a collective-bargaining statute: filing "unfair-labor-practice" charges in *City of Madison*; relying on the law's authorization of an "agency shop" in *Abood*; and negotiating monopolistic privileges for itself here. The situation in this case differs from those in *City of Madison* and *Abood* only in so far as this case presents the *internal* analogue of the problem those decisions addressed: The Perry Education Association has attempted to impose ideological conformity and silence dissent within the Metropolitan School District in order to protect its own internal political position as exclusive representative *vis-a-vis* teachers in the District; whereas, in *City of Madison* and *Abood* the exclusive representatives attempted to impose ideological conformity and silence dissent in order to advance their own external political positions as special-interest groups *vis-a-vis* governmental officials, candidates, and the electoral public. Constitutionally, though, this distinction is one without a difference. For the relationship among teachers, and their organizations, within a collective-bargaining unit in the public sector is inescapably political in nature.[47] And all political relationships are entitled to the same level of constitutional protection under the First and Fourteenth Amendments.[48]

The strict application of the doctrine of *City of Madison* and *Abood* is particularly apt here, where

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[47] *See id.* at 222, 228-29, 231 (opinion of Stewart, J.).

[48] *See id.* at 231-32 (opinion of Stewart, J.). This rule applies even in the narrow employer-employee context. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413-16 (1979).

the Court of Appeals found that the Perry Education Association negotiated the "exclusive-access" provision at issue in this litigation "[i]n anticipation of continuing opposition from [the Perry Local Educators' Association]", and for the purpose of "cement-[ing] its status as bargaining representative".[49] Obviously, if the "legitimacy" of exclusive representation depends on its supposedly democratic character, then any practice that detracts from democratic procedures and values—such as stifling the voices of opponents—also undermines the "legitimacy" of the system itself, and must receive this Court's most searching and suspicious review.[50]

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[49] Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1288 (7th Cir. 1981).

[50] The term "legitimacy" appears in quotation marks to emphasize its speciousness when used in reference to exclusive representation. Exclusive representation may be democratic in form, because it involves the process of majority-vote. In substance, however, it is anything but democratic, as that term must be understood in the context of constitutional law. For exclusive representation assumes that basic individual freedoms are subject to collective control; whereas, our Constitution rejects the doctrine of unlimited majority-rule, whether the majority consists of one's co-workers, one's "class", or one's countrymen. *E.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); Citizens Against Rent Control v. City of Berkeley, —— U.S. ——, ——, 101 S.Ct. 434, 437 (1981); Gordon v. Lance, 403 U.S. 1, 6 (1971); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736-37 (1964); *see* Kingsley Internat'l Pictures Corp. v. Regents of N.Y. Univ., 360 U.S. 684, 689 (1959).

III. Discriminatory suppression of public-school teachers' opportunity to criticize their exclusive representative in the school unjustifiably abridges the teachers' political freedom, whether enforced directly by governmental *fiat*, or imposed indirectly by a collective-bargaining agreement.

That the "exclusive-access" provision the Perry Education Association negotiated discriminatorily denies the Perry Local Educators' Association and other dissident teachers an equal opportunity to communicate their views on matters pertaining to exclusive representation in the Metropolitan School District, no one denies. The question is whether this discrimination is justifiable. Precedent and principle answer that question in the negative.

Both *City of Madison* and *Abood* held that no justification exists for the imposition of ideological conformity among public-school teachers by their exclusive representatives. For example, rejecting the proposition that an exclusive representative could stifle dissent through "unfair-labor-practice" charges, this Court emphasized in *City of Madison* that "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is *the antithesis of constitutional guarantees*".[21] "Surely no one would question", the Court went on,

> the *absolute right* of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communi-

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[21] 429 U.S. at 175-76 (footnote omitted) (emphasis supplied).

> cate those views directly to [governmental officials].[52]

Then, rejecting the proposition that an exclusive representative could impose ideological conformity through "agency-shop" exactions, in *Abood* this Court "[held] that compelling an employee to finance a union's ideological activities unrelated to collective bargaining violates the First Amendment *regardless of any asserted governmental justification*".[53] Thus, both *City of Madison* and *Abood* established a rule without exceptions, qualifications, or equivocal invocations of "interests" that needed "balancing". Because this rule is applicable here, the "exclusive-access" provision denying dissident teachers the equal opportunity to use teacher-mailboxes to communicate with their peers on matters concerning the internal politics of their collective-bargaining unit is self-evidently "the antithesis of constitutional guarantees", abridges "the absolute right of the nonunion teachers to consult among themselves", "strain[s] First Amendment concepts extraordinarily", and is invalid "regardless of any asserted governmental justification".

Basic principles of constitutional adjudication dictate the same result. Those defending an action taken under color of law that limits the freedoms of speech and association, or denies political equality, must demonstrate that the limitation or discrimination is relevant in reason to an otherwise permissible governmental goal *itself unrelated to the suppression of communicative and associational liberty or to the estab-*

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[52] *Id.* at 176 n.10 (emphasis supplied).

[53] 431 U.S. at 254 (Powell, J., concurring in the judgment) (emphasis supplied). *See id.* at 230, 235-36 (opinion of Stewart, J.).

lishment of political inequality.[54] For interference with constitutionally protected liberty or equality *as such,* either by government or by private parties exercising delegated governmental authority, is always unjustifiable.[55] Here, however, as the Court of Appeals found, the "exclusive-access" provision serves no goal unrelated to the suppression of communicative and associational liberty or to the establishment of political inequality. No, indeed. Its very purpose is precisely to suppress such liberty, and to establish such inequality, in order "to cement [the Perry Education Association's] status as bargaining representative".[56] Therefore, the provision is invalid *per se.*

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[54] *Freedom of association and speech:* United States v. O'Brien, 391 U.S. 367, 376-77 (1968), *explained in* Elrod v. Burns, 427 U.S. 347, 363 n.17 (1967) (opinion of Brennan, J.). *See* Spence v. Washington, 418 U.S. 405, 413 n.8 (1974). *Political equality:* Reynolds v. Sims, 377 U.S. 533, 565-66 (1964).

[55] *E.g.,* in the area of First-Amendment freedoms, *see* Gooding v. Wilson, 405 U.S. 518, 527 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 615-16 (1971); Schneider v. Smith, 390 U.S. 17, 25 (1968); Brown v. Louisiana, 383 U.S. 131, 142 (1966); Cox v. Louisiana, 379 U.S. 536, 551-52 (1965); Edwards v. South Carolina, 372 U.S. 229, 237 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1945); Grosjean v. American Press Co., 297 U.S. 233, 250-51 (1936); Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (Black, J., concurring).

[56] Pery Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1288 (7th Cir. 1981).

The Perry Education Association lamely suggests that the goal of the "exclusive-access" provision is "labor peace". Jurisdictional Statement, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, No. 81-896 (U.S. Sup. Ct., filed 12 Nov. 1981), at 17. The Association begs the question of what "labor peace" means in this context, though. For an analysis of the problem, *see* Vieira, *ante* note 3, 1977 *Det. C. L. Rev.* at 530-47, 553-58.

Consistently with the Constitution, the Metropolitan School District itself could not have imposed a prohibition against teachers affiliated with the Perry Local Educators' Association distributing ideological literature through the system of teacher-mailboxes, at least (i) where those mailboxes were open to other communications of that kind, and (ii) where the District could not establish, with clear and convincing evidence,[57] that such distribution materially and substantially interfered with the performance of teachers' duties or the operations of the school.[58] The District gained no more power discriminatorily to prohibit speech by negotiating a provision with that effect in a collective-bargaining agreement. Neither could it delegate to the Perry Education Association a power it did not have, and agree that that organization might "waive" the rights of dissident teachers in order to secure the Association's own political position against their criticism. Being unable to demonstrate—with clear and convincing, preponderant, or even any evidence—that the "exclusive-access" provision bears a rational relationship to an attempt to forefend material and substantial interference with the performance of teachers' duties or the operations of the school, the District and

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[57] *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50-52 (1971) (opinion of Brennan, J.); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82-83 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964); Bruns v. Pomerleau, 319 F. Supp. 58, 66 (D. Md. 1970). *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 276-77 (1971).

[58] *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 512-14 (1969); Pickering v. Board of Educ., 391 U.S. 563, 572-73 (1968).

the Association lack a justification for that provision. And it stands revealed for what it is: a scheme to license "one side of a debatable public question to have a monopoly in expressing its views", a scheme which in principle this Court has already condemned in *City of Madison* as "the antithesis of constitutional guarantees".[29]

IV. The instant case illustrates once again that collective bargaining in public-sector employment is a form of political regulation, every aspect of which the courts must scrutinize according to the strictest First- and Fourteenth-Amendment standards.

That what appears at first glance to be merely a clause in a public-sector collective-bargaining agreement actually on analysis embodies "the antithesis of constitutional guarantees" points out the true significance of this litigation. With *City of Madison* and *Abood,* this case shows that every aspect of public-sector bargaining involves serious political and constitutional problems, with which state and national courts will be faced again and again until this Court imposes definite and firm limits on the pretensions of private special-interest groups such as the Perry Education Association.

In the final analysis, the desire of private special-interest groups for the status of exclusive representatives in public-sector bargaining is the desire to exercise monopolistic control or influence over the procedure and substance of decision-making by governmental agencies at the local, state, and national levels.[30]

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[29] 429 U.S. at 175-76 (footnote omitted).

[30] Vieira, *ante* note 8, 27 *DePaul L. Rev.* at 364-67.

And the exercise of the prerogatives of exclusive representation by these groups reflects that desire: as in *City of Madison,* where the representative misused "unfair-labor-practice" charges in an unsuccessful attempt to silence dissident teachers at a public meeting; as in *Abood,* where the representative misused a statutory authorization for "agency-fees" in an unsuccessful attempt to force dissident teachers to finance political campaigns and causes they opposed; and as in this litigation, where the representative misused the bargaining process in an unsuccessful attempt to stifle criticism among dissident teachers and thereby "cement its status as bargaining representative".[61] Simply put, *exclusive representation in public-sector employment is a form of political monopoly,* both in theory and as applied by organizations such as the Perry Education Association. And monopoly—particularly political monopoly—inevitably tends to excess, abuse, and (ultimately) the tyrannous corruption of all "absolute power".

No one, least of all this Court, can gainsay the inherently political character of public-sector bargaining and exclusive representation. Indeed, in *Abood,* eight Justices explicitly recognized that the bargaining process itself,[62] the aspirations and activities of public-employee organizations,[63] or both are inescapably political. And no one can devise a definition, formula, or

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[61] Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1288 (7th Cir. 1981).

[62] 431 U.S. at 227-29 (opinion of Stewart, J.), 257-59 (Powell, J., concurring in the judgment).

[63] *Id.* at 231 (opinion of Stewart, J.), 243 (Rehnquist, J., concurring), 255-57 (Powell, J., concurring in the judgment).

test that can separate "collective-bargaining politics" from all other forms of "politics" for purposes of constitutional adjudication. For the Constitution affords no special status or privileges to employee-organizations or labor unions.[44] And reason offers no credible distinctions between sub-categories of "politics" that suggest the appropriateness of disparate judicial treatment for "collective-bargaining politics" as opposed to all other varieties.[45]

This being so, this Court must hold that, because public sector bargaining is a form of political decision-making and exclusive representation is a form of political monopoly, all questions concerning their validity in any application involving speech or association must be resolved according to the strictest standards of the first and Fourteenth Amendments.

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[44] *E.g.*, Carey v. Brown, 447 U.S. 455, ——, 100 S. Ct. 2286, 2293 (1980); Thomas v. Collins, 323 U.S. 516, 538 (1945); Coppage v. Kansas, 236 U.S. 1, 16-17 (1915). *See* E. Vieira, Jr., *ante* note 18, at 63-75.

[45] Distinguishing between types of "politics" is as fruitless a task as distinguishing between types of "speech". *See* Metromedia, Inc. v. City of San Diego, —— U.S. ——, ——, 101 S. Ct. 2882, 2907-09 (1981) (opinion of Brennan, J.); Lehman v. City of Shaker Heights, 418 U.S. 298, 318-20 (1974) (Brennan, J., dissenting); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969); Winters v. City of New York, 333 U.S. 507, 510 (1948).

CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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8 April 1982

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of the attached Brief *Amicus Curiae* of Public Service Research Council on each of the following persons, by depositing said copies in a United States post office, first-class postage prepaid, addressed as indicated below:

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Done this 8th day of April, 1982

Docket Sheet

NO. 81-896-AFX	TITLE Perry Education Association, Appellant v. Perry Local Education Association, et al.

DOCKETED	COURT
Nov. 12, 1981	United States Court of Appeals for the Seventh Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Robert H. Chanin
	Counsel for Appellees: Richard L. Zweig, Lawrence M. Reuben
Nov. 12, 1981	Statement as to jurisdiction filed. (Record filed).
Dec. 15, 1981	Motion of appellees to dismiss or affirm filed.
Dec. 16, 1981	DISTRIBUTED. 1-8.
Jan. 11, 1982	Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

Feb. 23, 1982	Order extending time to file the appendix and appellant's brief on the merits until March 11, 1982.
March 11, 1982	Joint appendix filed.
March 11, 1982	Brief for the appellant filed.
March 19, 1982	Memorandum for the United States Postal Service as amicus curiae filed.
Apr. 8, 1982	Brief, amicus curiae, of the Public Service Research Council filed.
Apr. 14, 1982	Order extending time to file the appellees' brief on the merits until Apr. 29, 1982.
Apr. 29, 1982	Brief for the appellees filed.
July 13, 1982	CIRCULATED.
Oct. 6, 1982	Reply brief for the appellant filed. (D).
Oct. 13, 1982	ARGUED.